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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 969

KECO INDUSTRIES, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Franklin M. Schultz
888 Seventeenth St., N.W.
Washington, D. C. 20006
Paul W. Steer
2215 Central Trust Tower
Cincinnati, Ohio 45202
Attorneys for Petitioner

Of Counsel:
Steer, Strauss, White
& Tobias
2215 Central Trust Tower
Cincinnati, Ohio 45202
J. Sumner Jones
Purcell & Nelson
888 Seventeenth St., N.W.
Washington, D. C. 20006

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Keco Industries, Inc., petitioner herein, prays that a writ of certiorari issue to review the decision of the United States Court of Claims in this case, which was entered on July 15, 1966.

OPINION BELOW

The opinion of the Court of Claims (App. B, *infra*, pp. 25-71) is unreported.

JURISDICTION

The opinion and order of the Court of Claims were entered on July 15, 1966. A timely petition for rehearing filed on August 8, 1966 was denied on October 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1).

QUESTIONS PRESENTED

1. Whether a court may under a standard Changes clause make an equitable adjustment to the contract price of a unit-priced government contract which gives the contractor less compensation than he would receive were the adjustment made under the standard termination-for-convenience clause.

2. Whether substitution of electric powered refrigeration units for gasoline powered refrigeration units under the Changes clause of a unit-priced government contract violates this Court's established principle that only such changes may be made in contract specifications as were reasonably contemplated by the parties.

CONTRACTUAL PROVISIONS INVOLVED

The pertinent provisions of the contract involved are set forth in Appendix A, *infra*, pp. 16-24.

STATEMENT

This case arose out of four contracts awarded petitioner ("Keco" or "the contractor") in June 1952 by respondent United States, acting through the Army Quartermaster Depot. These contracts involved the production of 270 refrigeration units of which 170 were to be electric powered and 100 to be gasoline powered. The contract contained standard clauses concerning "Changes," "Termination for Convenience of the Government," "Variation in Quantity," and "Disputes." App. A,

infra, pp. 16-24. It also contained a clause reserving to the Government the option to increase or decrease the quantity ordered only at the time of award ("Increase-Decrease Option" clause). App. A, *infra*, pp. 23-24.

Of the four contracts awarded petitioner for the production of the 270 refrigeration units, one required the contractor to furnish 100 electric powered units priced at $1,271 each under a military specification and 100 gasoline powered units priced at $1,720 each under a different military specification. There was no reference in either specification to the other. The Government did not exercise its option to increase or decrease the quantity ordered at the time of award.

On June 18, 1953, one year after the award but before Keco had produced any gasoline powered units, the contracting officer wrote to Keco that in accordance with the Changes clause the 100 gasoline powered units were to be changed to an additional 100 electric powered units. Sometime in June, petitioner stopped work on the gasoline motor unit pilot model (Finding 18(b), App. B, *infra*, p. 59), and on June 30, 1953 responded that it was agreeable to the suggested change and that it would allow a credit against the contract price. After several personal conferences and related correspondence Keco stated its position to be that it was entitled to an upward adjustment in the price of the substituted electric units to $1,919, representing the audited costs of manufacturing the electric units plus a profit. The contracting officer first took the position that the Government was entitled to a downward equitable adjustment of $449 per unit for this change since this amount represented the difference in unit contract price of the two units. On October 9, 1953 Change Order No. 2 was formally issued eliminating the 100 gasoline powered units and adding the 100 additional electric powered units.

A Government audit revealed that although the unit contract price on the electric powered units was $1,271

and the unit contract price on the gasoline powered units was $1,720, Keco's costs on the electric units were $1,603 and on the gasoline units $1,868. Keco was therefore sustaining a unit loss of $332 on the electric powered units and a unit loss of $148 on the gasoline powered units. See App. B, *infra*, p. 35.

On March 19, 1954 the contracting officer made findings adjusting the contract price downward $350 from $1,720 (the gasoline unit price) and allowed a unit price of $1,369 for the 100 changed units.

On the contractor's timely appeal to the Armed Services Board of Contract Appeals ("ASBCA"), the Board found the contracting officer's adjustment inequitable because it placed the contractor in a worse position than he would have been in had the gasoline powered units been produced at the Government's estimated production cost. The Board concluded that the unit price of the changed units should be adjusted to $1,763, which represented the Government's audited cost of $1,603 plus a 10 percent profit.

Petitioner brought a timely action for damages in the Court of Claims. In the proceedings before the commissioner, the parties relied solely on the ASBCA administrative record. Petitioner took the position that the substitution of electric powered units for gasoline powered units was outside the scope of the Changes clause, that respondent's action in making the change constituted a breach of contract, and that the measure of damages was the reasonable value of the substituted units. In the alternative, petitioner asserted that, even if the change order were valid, petitioner was entitled to a higher unit cost allowance than the cost allowed by the Board. Respondent's position was that the actual cost plus profit formula used by the Board was legally erroneous, that under its counterclaim respondent was entitled to a downward equitable adjustment of the unit contract price measured by the difference in cost be-

tween the two types of units ($1,868 and $1,603, *i.e.*, $265), and that accordingly the unit price for the changed units should be $1,720 (contract price of the gasoline units) less $265 or $1,454. Since the Board had allowed $1,763 as the adjusted unit price, respondent was in effect claiming the difference between $1,763 and $1,454, *i.e.*, $309.16 per unit or $30,916 for the 100 changed units.

On May 18, 1964 the commissioner made findings denying Keco's petition and granting respondent's counterclaim for $30,916.[1] On July 15, 1966 the Court of Claims accepted the commissioner's opinion, findings of fact and recommended conclusions of law, with minor modifications. Petitioner filed a timely motion for rehearing which was denied on October 14, 1966.

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of Federal procurement law which has not been but should be decided by this Court. The Court of Claims allowed the Government's contracting officer to alter a contract by means of the standard Changes clause in circumstances where the contracting officer could have made the desired modification by partially terminating the contract under the Termination for Convenience of the Government clause ("Convenience Termination clause"). As a result of the contracting officer's election to use the Changes clause, Keco received a substantially reduced compensation from what it would have received had the contracting officer used the Convenience Termination clause. This case poses a fundamental conflict between

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[1] The recommended judgment was in the amount of $29,830.60, representing respondent's counterclaim of $30,916 less $1,085.40, the amount allowed petitioner on a separate claim not pertinent to this petition. As a result of the judgment entered by the court, Keco will be required to return to respondent $29,830.60 awarded by the ASBCA in March, 1956.

the use of unequal measures of compensation under the Changes clause and the Convenience Termination clause in fixed-price contracts where portions or units of the contract are separately priced. This is an issue of general application in the administration of government contracts, and one of considerable importance to the Federal Government's procurement policy. Certiorari should therefore be granted to correct a decision which, if left standing, will give contracting officers an option which can be unconscionably employed against persons contracting with the Federal Government.

The decision of the Court of Claims in this case approved the Government's use of a change order eliminating 100 unit-priced gasoline powered refrigeration units from the contract and substituting 100 additional unit-priced electric powered refrigeration units. The "equitable adjustment" which was made required the petitioner to sustain a loss equal to the estimated loss which would have occurred had the change not been made. However, had the contracting officer accomplished the same result by partially terminating the contract with respect to the 100 gasoline powered units and negotiating a supplemental contract for the additional quantity of electric powered units, the result would have been to limit the petitioner's loss to the original 100 electric powered units. By exercising its technical privilege to order a change rather than a partial termination, the Government caused a substantial increase in petitioner's loss.[2]

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[2] The record evidence indicates that the contracting officer may have been influenced by his knowledge of the loss position of the petitioner in deciding to issue a change order to eliminate the gasoline powered units and to substitute additional electric powered units. On June 18, 1953 the contracting officer notified the petitioner of his intention to order a change, referring to the "Changes Article" of the contract (Finding No. 18(a), App. B, *infra*, p. 59); it was not until October 9, 1953 that a formal change order was issued. Finding No. 20(a), App. B, *infra*, p. 61. However, the ASBCA record indicates that in the interim

In a contract where portions or units of the contract are separately priced, there is no justification for permitting an equitable adjustment to be made under the Changes clause which varies substantially from the measure of relief afforded by the Convenience Termination clause. The decision of the Court of Claims in this case sanctions such a variance, thereby giving the Government's contracting officer an arbitrary power to affect the contractor's compensation.

This arbitrary power over the contractor's compensation exists whenever the contracting officer may use either the Convenience Termination clause or the Changes clause to accomplish the same contractual modification. Theoretically, he will have this power whenever he may order a change under the Changes clause, inasmuch as he has unlimited discretion to order a convenience termination. However, as a practical matter, he will use a convenience termination in place of a change order only when the costs of terminating are justified by the benefits to be derived by the Government. Only when termination or partial termination is a relatively simple and inexpensive alternative to a change order will the Government derive such benefits. Termination will be rela-

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Keco knew that it had made substantial errors in costing both units and that the contracting officer had access to Keco's records on both units and knew that the electric powered units were being produced at a loss, A. R. pp. 685-6. A portion of the ASBCA opinion relating to this evidence reads as follows:

> In our opinion appellant should not be left in a worse position as the result of the issuance of the change order, which caused it to produce units on which its loss due to an improvident bid on the electric unit was more than twice of its loss due to its improvident bid on the gasoline unit, *particularly when these facts were known to the Government.* . . . [See Finding No. 23, App. B, *infra*, p. 70.] (Emphasis added.)

Had the contracting officer believed that large profits would have been earned on the gasoline powered units — rather than substantial losses incurred — one can hardly suppose that he would not have elected to partially terminate the contract.

tively simple and inexpensive where the portion or unit terminated is sufficiently severable to be subject to separate pricing and where costs in respect of the eliminated performance have not been incurred. The severable nature of these separately priced portions or units permits the contracting officer to cancel a portion or unit without significantly affecting the costs of the work not eliminated. Moreover, where termination requires bringing in a new contractor for additional work, this may be accomplished without the substantial complications which occur when independent contractors jointly produce an integrated project or where one contractor completes a project partially performed by a prior contractor.

The contracting officer's power over the contractor's compensation where portions or units of the contract are separately priced is apparent. Whenever significant profits are being earned by a contractor, the contracting officer may elect to modify the contract by terminating the existing contract and negotiating a lower price for the modified performance. On the other hand, whenever the contractor is incurring a loss on the contract, it will be to the advantage of the contracting officer to proceed by way of the Changes clause in order to preserve the contractor's loss and keep the Government's advantageous bargain. Thus the Convenience Termination clause may be used to deprive the contractor of his bargained-for profit and the Changes clause to preserve his loss.

There is no justification for allowing the Government to have such an arbitrary power over the measure of a contractor's compensation. It is true that the unequal measures of compensation reflect, in general, the different functions of the two clauses: the Changes clause being designed to preserve the existing contract despite modifications being made therein, the Convenience Termination clause being designed to terminate or partially terminate the contract. Thus, the Changes clause makes

an adjustment to the original contract price based upon the reasonable value of the increased or reduced performance;[3] the Convenience Termination clause makes an adjustment on the basis of costs incurred with an adjustment for profit or loss with respect to such work. See Convenience Termination clause, para. (e), App. A, *infra*, pp. 19-21. However, where portions or units of the contracted-for performance are separately priced and costs with respect to the eliminated performance have not been incurred, the Convenience Termination clause like the Changes clause makes an adjustment to the original contract price. Both clauses operate to preserve the original contract to the extent that it is applicable to the contract as modified.

There is, of course, a substantial difference in the operation of the two clauses whenever the Government desires additional or modified work in place of the performance eliminated. In the event of a convenience termination, advertising may be required which may result in the substitution of a new contractor for the additional work. A flexible procurement policy may necessitate the Government's having a choice between requiring the existing party to perform and selecting a new contractor. But such a choice does not require and should not include a difference in the amount of compensation to be paid for identical work. Substitution of a new contractor to perform a separately priced portion of a contract is not a justification for awarding the contractor a lesser measure of remuneration.

The conflicting measures of compensation under the two clauses, created by the decision in the court below, result from different methods of adjusting the original contract price. When a separately priced portion or unit

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[3] Ribakoff, *Equitable Adjustments Under Government Contracts*, Government Contracts Monograph No. 3 - Changes and Changed Conditions 26, 27 (1962); Spector, *Confusion in the Concept of the Equitable Adjustment in Government Contracts*, 22 Fed. B. J. 5, 6 (1962).

of a contract is eliminated by partial termination, the continued and/or completed portions of the contract are governed principally by the contract price specified for such work (see Convenience Termination clause paras. (e)(1) and (h), App. A, *infra*, pp. 19-20, 22), and little or no adjustment is made for the terminated work inasmuch as no costs have been incurred. In essence, the total contract price is reduced by the price specified in the contract for the eliminated portion or unit. In contrast, when a change order is used to eliminate separately priced portions or units of a contract, the decision below sanctions a reduction of the total contract price — not by the price specified for the eliminated unit, as noted above — but by the estimated cost of producing the eliminated unit. Thus, where, as in the instant case, the estimated cost exceeds the contract price for that unit, the contractor's compensation on the continued units is reduced by the difference.

In sanctioning the contracting officer's choice of the Changes clause, the Court of Claims held that the formula for an equitable adjustment in this case was governed by its decisions in *S. N. Nielsen Co. v. United States*, 141 Ct. Cl. 793 (1958), and *Bruce Constr. Corp. v. United States*, 163 Ct. Cl. 97, 324 F.2d 516 (1963). In *Nielsen* the contractor entered into a government contract for certain construction work on the basis of a grossly improvident bid. His error resulted from incorrectly estimating the costs of constructing "the electrical part of the outside utilities work," 141 Ct. Cl. at 794. Subsequently, the contracting officer issued a change order substituting a less expensive type of construction for a part of the outside utilities electrical work. The contracting officer's equitable adjustment approved by the Court of Claims reduced the original contract price by the difference in the value of the work as originally contracted for and the work as changed. The court rejected the contractor's contention that the equitable adjustment

should have been made on the basis of the portion of the contractor's bid allocable to the substituted work, stating:

> We think the . . . figure is of no significance. It is only an allocation of a proportionate part of a larger sum which was itself grossly inadequate because of the mistake in bid. [141 Ct. Cl. at 797.]

The equitable adjustment used in *Nielsen* was based on the change in value resulting from the change order since there was no other realistic way to make an adjustment. In contrast, when the eliminated portion or unit has been separately priced in the contract, the price specified is the more realistic figure for adjusting contract price. Even if that figure is the result of an erroneous bid, an adjustment based upon the specified contract price is the only effective way of preserving the original contract — the essential purpose of an equitable adjustment under the Changes clause. [4]

Finally, to permit the contracting officer to use unequal measures of compensation under the two clauses is detrimental to a sound Government procurement policy. That the Government may reduce expenses is neither a justification nor a desired practical consequence. Contractors realizing the unbridled discretion of contracting officers to affect their profit or loss will either be more reluctant to enter government contracts or inflate their bids as a means of protection. In the long run, the public interest can only be injured.

In the instant case this Court is presented with a significant question as to the adverse consequences which may result from an arbitrary exercise of power by the

[4] The contract in *Bruce Constr. Corp., supra*, also relied on by the court below, did not contain separately priced portions or units. Moreover, the issue involved "whether 'cost' or 'fair market value' controls in the award of an equitable adjustment," 163 Ct. Cl. at 100, 324 F.2d at 518, an issue not involved in the instant proceeding.

Government's contracting officer in the performance of a fixed-price government contract. In view of the frequency with which such power may be exercised, certiorari should be granted to permit this Court to review and consider this question.

2. Certiorari should also be granted because the "cardinal change" test as applied in this case by the Court of Claims in determining that Change Order No. 2 did not constitute a breach of contract conflicts with this Court's opinion in *Freund v. United States*, 260 U.S. 60 (1922).

In *Freund* the Government ordered changes in mail routes specified in the contract. These changes were held to be beyond the limits of a special clause authorizing changes in such routes, the Court indicating a reluctance to permit changes not "within the four corners of the contract":

> These considerations, especially the first, have made this court properly attentive to any language or phrase of these enlarging provisions which may be properly held to limit their application to what should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into. [260 U.S. at 63.]

In this case, the Court of Claims used the cardinal change test as set forth in *Aragona Construction Company, Inc. v. United States*, 165 Ct. Cl. 382 (1964), to determine whether Change Order No. 2 was beyond the scope of the Changes clause. The court relied on the following paragraph from that case:

> In deciding whether a single change or a series of changes is a cardinal change and a breach of the contract, we must look to the work done in compliance with the change and ascertain whether it was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project

> it ultimately constructed was essentially the same as the one it contracted to construct. [App. B, *infra*, p. 39.]

In applying the cardinal change test to the facts of this case, the Court of Claims held that the essential nature of the contract had not been changed by Change Order No. 2 for the reason that the refrigeration units were essentially the same, even though the power units were different. Finding No. 21(d), App. B, *infra*, p. 63. However, in determining whether or not the change order constituted a cardinal change, the court failed to consider certain important terms of petitioner's contract.[5] Clearly, consideration of all pertinent contract terms is essential to understand "the contemplation of the parties," the test established by this Court in *Freund*. If the court below had examined the provisions of the instant contract, it would have recognized that the elimination of 100 gasoline powered refrigeration units and the substitution of 100 additional electric powered refrigeration units were beyond the reasonable contemplation of the parties at the time they entered into the contract.

This contract was severable with respect to the two types of refrigeration units to be produced. The contract award listed 100 electric powered refrigeration units as item No. 2 and 100 gasoline powered refrigeration units as item No. 3. A. R. pp. 173-4. See Finding No. 18(a), App. B, *infra*, p. 59. Other provisions of the contract setting forth the rights of the parties were in terms of the contract items. The Variation in Quantity clause provided that the contractor could not vary the "quantity of any *item* called for by this contract. . . ." (Emphasis added.) App. A, *infra*, p. 16. The Increase-

[5] For example, petitioner urged before the trial commissioner and the Court of Claims that the Increase-Decrease Option clause prohibited the use of a change order to accomplish the modifications ordered by the contracting officer. Neither the original opinion of the commissioner nor the court's opinion dealt with this issue.

Decrease Option clause granted the Government the right — at the time of contract award — to vary "the quantity specified . . . for any or all of the *items* or *sub-items*. . . ." (Emphasis added.) App. A, *infra*, pp. 23-24. Not only the contractual provisions in terms of specified items but also the separate pricing for each unit constituting the items demonstrate that the parties viewed the contract as one involving separate obligations with respect to the two types of refrigeration units. Inasmuch as the contract provisions for the two items were severable, the parties must have contemplated that rescinding the contracted-for performance with respect to the gasoline powered units could only be accomplished by a partial termination for the convenience of the government.

Further evidence of the instant change order's fundamental departure from the original understanding of the parties is found in the then applicable Army Procurement Procedures 7-103.2*b* (15 March 1951 ed., p. 7003), which provides:

> Additional quantities of supplies which were not initially contemplated in the contract will not be ordered under the "Changes" clause since such a practice might be used to defeat the requirements for competitive procurement.

In view of the contractual emphasis on separate items, the parties must be deemed to have understood the above-quoted regulation as applying to quantities of each supply item. Accordingly, use of a change order to increase the quantity of one contract item constitutes a modification clearly beyond the original contemplation of the parties.

In holding that Change Order No. 2 did not constitute a cardinal change and thus was not a breach of the contract, the Court of Claims applied a test sustaining a change not "fairly and reasonably within the contemplation of the parties when the contract was entered into,"

as required by this Court's holding in *Freund v. United States, supra,* and for this additional reason certiorari should be granted.

CONCLUSION

The decision below takes away from the contractor $29,830.60 which the ASBCA found the contractor entitled to as an equitable adjustment using a cost plus profit formula. In doing so the court below establishes an unfair principle of Federal procurement law.

For all the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Franklin M. Schultz
888 Seventeenth St., N.W.
Washington, D. C. 20006

Paul W. Steer
2215 Central Trust Tower
Cincinnati, Ohio 45202

Attorneys for Petitioner

Of Counsel:

Steer, Strauss, White
& Tobias
2215 Central Trust Tower
Cincinnati, Ohio 45202

J. Sumner Jones
Purcell & Nelson
888 Seventeenth St., N.W.
Washington, D. C. 20006

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APPENDIX A

1. The contract (DA 11-009-QM-19174) provided in pertinent part:

2. Changes

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled. "Disputes." However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

4. Variation in Quantity

No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.

12. Disputes

Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by

agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

21. Termination for Convenience of the Government.

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interests of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall (1) stop work under the contract on the date and to the extent specified in the Notice of Termination; (2) place no further orders or subcontracts for materials, services or facilities except as may be necessary for completion of such portion of the work under the contract as is not terminated; (3) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination; (4) assign to the Govern-

ment, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title and interest of the Contractor under the orders and subcontracts so terminated; (5) settle all claims arising out of such termination of orders and subcontracts, subject to the approval or ratification of the Contracting Officer, which approval or ratification shall be final for all purposes of this clause; (6) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of the work terminated by the Notice of Termination, and (ii) the completed or partially completed plans, drawings; information, and other property which, if the contract had been completed, would have been required to be furnished to the Government; (7) use its best efforts to sell, in the manner, at the times, to the extent, and at the price or prices directed or authorized by the Contracting Officer, any property of the types referred to in provision (6) of this paragraph, *provided, however,* that the Contractor (i) shall not be required to extend credit to any purchaser, and (ii) may keep any such property at a price or prices approved by the Contracting Officer; and provided further that the proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the Government to the Contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the Contracting Officer may direct; (8) complete performance of such part of the work as shall not have been terminated by the Notice of Termination; and (9) take such action as may be necessary, or as the Contracting Officer may direct, for the protection and preservation of the property related to this contract which is in the possession of the Contractor and in which the Government has or may acquire an interest.

(c) After receipt of a Notice of Termination, the Contractor shall submit to the Contracting Officer its termination claim, in the form prescribed

by the Contracting Officer. Such claim shall be submitted promptly but in no event later than one year from the effective date of termination, unless one or more extensions in writing are granted by the Contracting Officer upon request of the Contractor made in writing within such one year period or authorized extension thereof. Upon failure of the Contractor to submit its termination claim within the time allowed, the Contracting Officer shall determine, on the basis of information available to him, the amount, if any, due to the Contractor by reason of the termination.

(d) Subject to the provisions of paragraph (c), the Contractor and the Contracting Officer may agree upon the whole or any part of the amount or amounts to be paid to the Contractor by reason of the total or partial termination of work pursuant to this clause, which amount or amounts may include a reasonable allowance for profit, but only on work done in connection with the terminated portion of the contract. The contract shall be amended accordingly, and the Contractor shall be paid the agreed amount. Such amendment shall be final and conclusive upon the Contractor and the Government. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the Contractor in the event of a failure of the Contractor and the Contracting Officer to agree upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (d).

(e) In the event of the failure of the Contractor and the Contracting Officer to agree as provided in paragraph (d) upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant to this clause, the Government, but without duplication of any amounts agreed upon in accordance with paragraph (d) shall pay to the Contractor the amounts determined as follows:

(1) For completed supplies accepted by the Government and not therefore paid for, a sum equivalent to the aggregate price for such sup-

plies computed in accordance with the price or prices specified in the contract, appropriately adjusted for any saving of freight or other charges;

(2) The total of:

(i) the costs incurred in the performance of the work terminated, exclusive of any costs attributable to supplies paid, or to be paid for under paragraph (e)(1) hereof;

(ii) the cost (which may include a reasonable allowance for profit to subcontractors or vendors, but only on work done in connection with the terminated portion of any subcontract or order) of settling and paying claims arising out of the termination of work under subcontracts or orders, as provided in paragraph (b)(5) above, which are properly chargeable to the terminated portion of the contract (exclusive of amounts paid or payable on account of supplies or materials delivered or services furnished by subcontractors or vendors prior to the effective date of the Notice of Termination, which amounts should be included in the costs payable under (i) above), provided that:

(A) Each such claim has been settled with the written approval of the Contracting Officer; or

(B) If a final judgment has been rendered against the Contractor, or a subcontractor or vendor, by a court of competent jurisdiction determining the liability of the Contractor, subcontractor or vendor with respect to any such claim, the Contracting Officer has determined that such judgment or a part thereof is allocable to the terminated portion of the contract.

(In order for a judgment to be allowable under this subparagraph (ii), the Contractor, or subcontractor or vendor concerned, must have given the Contracting Officer prompt notice of the initiation of the proceedings in which such judgment was rendered and offered in writing to give the Government complete control of the defense of the proceedings, and must have diligently defended the suit or, if the Government

has assumed control of the defense of the proceedings, must have rendered such reasonable assistance as has been requested by the Government. If such judgment includes amounts for loss of anticipatory profits or consequential damages, such amounts will not be allowable under this subparagraph);

(iii) a sum equal to 2% of that part of the amount determined under (i) which represents the cost of articles and materials not processed by the Contractor, plus a sum equal to 8% of the remainder of such amount, but the aggregate of such sums shall not exceed 6% of the whole of the amount determined under (i) above.

(3) The reasonable costs of settlement, including accounting, legal, clerical, and other expenses reasonably necessary for the preparation of settlement claims and supporting data with respect to the terminated portion of the contract and for the termination and settlement of subcontracts thereunder, together with reasonable storage, transportation, and other costs incurred in connection with the protection or disposition of termination inventory.

The total sum to be paid to the Contractor under (1) and (2) of this paragraph (e) shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the Government shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the Contractor as provided in paragraph (e)(1) and paragraph (e)(2)(i), any amounts allocable to or payable in connection with property which is destroyed, lost, stolen or damaged so as to become undeliverable to the Government, or to a buyer pursuant to paragraph (b)(7).

(f) The Contractor shall have the right of appeal, under the clause of this contract entitled "Disputes," from any determination of the amount due to the Contractor made by the Contracting Officer under paragraphs (c) or (e) above, except

that if the Contractor has failed to submit its claim within the time provided in paragraph (c) above and has failed to request extension of such time, he shall have no right of appeal. In any case where the Contracting Officer has made a determination of the amount due under paragraph (c) or (e) above, the Government shall pay to the Contractor the following: (i) if there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the Contracting Officer, or (ii) if an appeal has been taken, the amount finally determined on such appeal; any such determination being final and conclusive upon the Contractor and the Government.

(g) In arriving at the amount due the Contractor under this clause there shall be deducted (1) all unliquidated advance or other unliquidated payments on account theretofore made to the Contractor, (2) any claim which the Government may have against the Contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies or other things kept by the Contractor or sold, pursuant to the provisions of this clause, and not otherwise recovered by or credited to the Government.

(h) If the termination hereunder be partial, prior to the settlement of the terminated portion of this contract, the Contractor may file with the Contracting Officer a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the Notice of Termination), and such equitable adjustment as may be agreed upon shall be made in such price or prices.

(i) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess

shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate of 6% per annum, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government.

(j) Any determination of costs under paragraph (c) or (e) hereof shall be governed by the Cost Principles set forth in Section XV of the Armed Services Procurement Regulation, as in effect on the date of this contract.

(k) Unless otherwise provided for in this contract, or by applicable statute, the Contractor, from the effective date of termination and for a period of three years after final settlement under this contract, shall preserve and make available to the Government at all reasonable times at the office of the Contractor, but without expense to the Government, all its books, records, documents, and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

2. The invitation for bids (QM 11-009-52-1089) provided in part:

14. Increase-Decrease Option.

The Government reserves the right in making awards: To increase the quantity specified in this Invitation for any or all of the items or sub-items by not more than twenty-five percent (25%) at the time of making awards; and to decrease the quantity specified for any or all items or sub-items to the extent considered advisable by the Government.

To increase the quantity to be awarded to a bidder who has bid on the entire quantity of any item or sub-item by not more than twenty-five percent (25%) of any such item or sub-item, if the bidder has indicated in the space provided in the bid that an increase is acceptable. (See also Par. 1 above entitled "AWARD").

If the Government elects to take a different quantity than that advertised for or bid upon, pro rata delivery based on the delivery schedule specified in the bid Form will be required except where a single delivery is called for. In the latter case delivery must be made in the time specified for the advertised quantity.

APPENDIX B

In the United States Court of Claims

No. 277-56

(Decided July 15, 1966)

KECO INDUSTRIES, INC. v. THE UNITED STATES

Paul W. Steer, attorney of record, for plaintiff. *Steer, Strauss, White & Tobias*, of counsel.

Lawrence S. Smith, with whom was *Assistant Attorney General John W. Douglas*, for defendant.

Before COWEN, *Chief Judge*, WHITAKER, *Senior Judge*, LARAMORE, DURFEE, and DAVIS, *Judges*.

OPINION

PER CURIAM: This case was referred to Trial Commissioner Richard Arens with directions to make findings of fact and recommendation for conclusions of law. The commissioner has done so in an opinion and report filed on May 18, 1964. Plaintiff filed exceptions to the commissioner's report and recommended conclusion of law with reference to claim No. 3 (Change Order No. 2), and in its brief, filed August 18, 1964, at p. 5 thereof, stated that no exception was taken by plaintiff with regard to the commissioner's opinion and recommendation concerning claim No. 1 (Spare Parts and Tools), and claim No. 2 (Excess Weight). The case was submitted to the court on plaintiff's exceptions to claim No. 3, the briefs of the parties and oral argument of counsel. By order of May 13, 1966, plaintiff was granted leave to file a post-argument memorandum with defendant granted leave

to file a response thereto. No response has been filed by the defendant and the time granted therefor has expired. Since the court is in agreement with the opinion and recommendation of the commissioner, with modifications, it hereby adopts the same, as modified, as the basis for its judgment in this case, as hereinafter set forth. Therefore, it is concluded that as to claim No. 1 (Spare Parts and Tools), plaintiff is due $1,085.40; that plaintiff's claims No. 2 (Excess Weight) and No. 3 (Change Order No. 2) are denied; and that defendant is entitled to recover on its counterclaim the amount of $30,916, so that offsetting plaintiff's recovery on claim No. 1 against defendant's recovery on its counterclaim, defendant is entitled to recover a net judgment on the counterclaim in the amount of $29,830.60, and judgment is entered for defendant in that amount.

Commissioner Arens' opinion*, as modified by the court, is as follows:

Plaintiff was awarded four contracts in June 1952 by the Army Quartermaster Depot to produce 270 refrigeration units of which 170 were to be electric driven and of which 100 were to be gasoline driven. The only significant differences in the four contracts were in price and specifications for the 100 gasoline driven units.

Plaintiff makes three claims arising out of the contracts, which were the subject of decision by the contracting officer and thereafter, upon timely appeal by the Armed Services Board of Contract Appeals under the usual provisions on Changes and Disputes contained in Government supply contracts. Plaintiff contends that with reference to each claim the Board made legally erroneous interpretations of the contract documents, and/or that the decisions of the Board on the matters embraced in each claim were not supported by substantial evidence. Defendant, in addition to controverting plaintiff's claims, seeks recovery under its counterclaim on the theory that a legally erroneous formula was used by the Armed Services Board of Contract Appeals in deciding one of plaintiff's claims.

The only evidence in the case is the administrative record which was received in evidence in a pretrial conference and

*The opinion, findings of fact and recommendation for conclusion of law are submitted under the order of reference and Rule 45(a), now Rule 57(a).

which consists of the contract documents, the transcript made before the Board, all exhibits considered by it, and the Board decision.[1]

(1)

Spare Parts and Tools

Plaintiff claims the sum of $20,038.10, representing the price of spare parts and tools furnished by it to defendant and amounts deducted from the contract price by defendant following deletions and substitutions in spare parts and tools.

The issue presented is whether under the contract defendant had only an option to take and pay for spare parts and tools, as plaintiff contends, or whether plaintiff was obligated to furnish certain spare parts and tools within the contract price, and with an option to defendant to procure other items, as defendant contends.

The pertinent provisions of the contract documents are set forth in paragraph 4 of the Findings of Fact. These include the following specifications applicable to electric driven units:

> 3.5.8.1 Spare parts.—The refrigerating system shall be shipped complete with the following spare parts:
>
> COMPRESSOR PARTS
>
> (Four parts listed).
>
> MISCELLANEOUS PARTS
>
> (Thirteen parts listed).
>
> 3.5.8.2 Tools.—Each refrigerating system shall be shipped complete with the following tools:
>
> SPECIAL MAINTENANCE TOOLS
>
> (Fifteen tools listed).

Prior to the opening of the bids and the awarding of the contracts, the foregoing specifications were amended by Amendment No. 4 which reads in part:

[1] At the pretrial conference an order was entered directing plaintiff's counsel to file a detailed statement in the nature of an assignment of errors of law allegedly committed by the Board and a statement of the specific decisions of the Board which allegedly were not supported by substantial evidence. The order also required a responding statement by defendant's counsel.

7. CONCURRENT SPARE PARTS—MAPI

The right is reserved to the Government to select such items from the 'Combined Reference Data List' as it may deem appropriate and/or to add such items as components, parts, tools, etc., as may be required, to be shipped concurrently with each end item, in accordance with Section III, Part I and III of 'Instructions for the Preparation of Combined Reference Data Lists and Photographic Illustrations' dated 1 April 1952.

8. CONCURRENT DEPOT SPARE PARTS SETS

The Government reserves the right to purchase concurrent Depot Spare Parts Sets in accordance with Section III, Parts II and III of 'Instructions for the Preparation of Combined Reference Data Lists and Photographic Illustrations' dated 1 April 1952.

Amendment No. 4 also had in it the following statement in item 22, page 7, in reference to paragraph 3.5.8.1 of the specifications:

Spare parts—Delete 'compressor parts' shown on page 12 and at the top of page 13. Also, under Miscellaneous Parts delete items '1 and 4'.

The contract documents include the following specifications applicable to gasoline driven units:

3.4.8 Spare parts and tools.—

3.4.8.1 Spare parts.—The refrigerating system shall be shipped complete with the following spare parts:

COMPRESSOR PARTS
(Four parts listed).

MISCELLANEOUS PARTS
(Twelve parts listed).

3.4.8.2 Tools.—Each refrigerating system shall be shipped complete with the following tools:

SPECIAL MAINTENANCE TOOLS
(Fifteen tools listed).

Plaintiff makes two contentions of fact which it asserts caused doubt and confusion as to the meaning of the contract documents which plaintiff alleges were ambiguous. The first contention is that the list of spare parts and tools included in the specifications for each type of refrigeration unit (electric or gasoline driven) contained items which could not be used with that unit. Secondly, plaintiff con-

tends that in a preaward conference plaintiff was advised by defendant in effect that spare parts and tools were not required to be furnished under the contract, except by special purchase under the option clauses. The evidence does not sustain either contention. (See paragraphs 5(a) and 5(b) of the Findings of Fact.)

Plaintiff further points out that in rejecting pilot model refrigeration units which were not accompanied by spare parts defendant's written rejection made no mention of spare parts and tools. The evidence establishes, however, (finding 6(e).) that the absence of spare parts and tools was orally called to the attention of plaintiff's agent by defendant's agent at the time of the inspection of the first pilot model and that plaintiff's agent expressed oral assurance that the spare parts and tools would follow.

Although defendant accepted shipments of refrigeration units in May 1953, without making deduction in payment because of absence of spare parts or tools, the evidence is that defendant's purchasing agent had no knowledge that the shipments did not include spare parts and tools and by July 1953 the parties were strongly asserting their respective and opposing positions on the issue by conference and correspondence. In the meantime, defendant was withholding $100 per refrigeration unit pending shipment of spare parts and tools. Thereafter, defendant made certain deletions and substitutions in the tools which, if tools are embraced within the contract price, would result in a price reduction.

On March 19, 1954, the contracting officer issued his findings of fact and decision with respect to various items in dispute, including the spare parts and tools issue, in which he ruled that spare parts and tools were embraced within the contract price which should be equitably adjusted downward because of a net reduction in value resulting from deletions and substitutions. After timely appeal and hearing before the Armed Services Board of Contract Appeals, the Board on March 30, 1956, sustained the contracting officer and denied that portion of plaintiff's appeal pertaining to spare parts and tools.

As indicated above, in addition to alleging that the Armed Services Board of Contract Appeals made legally erroneous

interpretations of the contract documents, plaintiff alleges that the decisions of the Board on the matters embraced in each claim were not supported by substantial evidence. This raises the question of the test to be employed by the court in its consideration of the claims in the light of *United States* v. *Carlo Bianchi & Co.*, 373 U.S. 709 (1963) in which the Supreme Court concluded that, "apart from questions of fraud, determination of the finality to be attached to a departmental decision on a quesiton arising under a 'disputes' clause must rest solely on consideration of the record before the department" under the standards contained in the *Wunderlich Act*. That act gives finality to the ultimate administrative determination of such question unless the decision thereon is "fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence." 68 Stat. 81, 41 U.S.C. 321 (1958).

The question presented in this claim, namely interpretation of the contract documents, is a question of law; hence, it is to be resolved independently by the court even though the sole record before the court is the administrative record. *Beacon Constr. Co.* v. *United States*, 161 Ct. Cl. 1, 314 F. 2d 501 (1963); *WPC Enterprises, Inc.* v. *United States*, 163 Ct. Cl. 1, 323 F. 2d 874 (1963); *Stein Bros. Mfg. Co.* v. *United States*, 162 Ct. Cl. 802, 337 F. 2d 861 (1963), decided July 12, 1963; *Wingate Constr. Co.* v. *United States*, 164 Ct. Cl. 131 (1964).

An examination of the contract documents does not reveal that the provisions relating to the furnishing of spare parts and tools were ambiguous as plaintiff suggests. These documents expressly provide that the refrigeration units were to be "shipped complete with the following spare parts" and were to be "shipped complete with the following tools," and in each instance the spare parts and/or tools were listed. It does not appear that the foregoing provisions are inconsistent with other provisions of the contract documents under which the Government reserved the right to purchase "components, parts, tools, etc., as may be required, to be shipped conourrently with each end item" in accordance with a Combined Reference Data List. The two sets of provisions can easily and reasonably be read together without one doing violence to the other. It is axiomatic in the law that a con-

tract is to be read from its "four corners." *City of New York* v. *United States*, 125 Ct. Cl. 576, 113 F. Supp. 645 (1953). Here the contract documents required plaintiff to furnish spare parts and tools and in addition provided an option to the Government to purchase components, parts, tools and other items. The only case cited by plaintiff on this issue is *Farwell Co.* v. *United States*, 126 Ct. Cl. 317, 115 F. Supp. 477 (1953) in which the question presented was whether a contract authorized substitution of copper tubing for brass or copper pipe. The court stated that it could not conclude from the contract documents that an ambiguity existed. There is a well established line of cases to the effect that "if some substantive provision of a government-drawn agreement is fairly susceptible of a certain construction and the contractor actually and reasonably so construes it, in the course of bidding or performance, that is the interpretation which will be adopted—unless the parties' intention is otherwise affirmatively revealed". *WPC Enterprises, Inc.* v. *United States*, *supra*. These cases are not, however, applicable to the instant case because the provisions under scrutiny here are not fairly susceptible of the construction which plaintiff advocates. In *Russell & Pugh Lumber Company* v. *United States*, 154 Ct. Cl. 122, 128, 290 F. 2d 938 (1961), the court stated "Since we have, in effect, determined that the document in question was not susceptible of an intelligent meaning other than that intended by the defendant, the line of cases which holds that an ambiguous contract susceptible of several possible meanings must be construed against the party which drew it likewise has no applicability to the present situation."

In *Hotpoint Co.* v. *United States*, 127 Ct. Cl. 402, 406, 117 F. Supp. 572, 574, *cert. denied*, 348 U.S. 820, (1954), the court stated:

> It is an elementary canon in interpreting a contract that the court should, where the language of the contract is unambiguous, ascertain and effectuate the intention of the parties as expressed by the language in the contract. In so doing the court should give the terms their usual and ordinary meaning even though the intention of one of the parties may have been different from that expressed. *Hongkong & Whampoa Dock Co., Ltd.* v. *United States*, 50 Ct. Cl. 213, and the cases cited therein.

It is concluded that plaintiff was obligated under the contract to furnish the spare parts and tools within the contract price. It is to be noted, however, that in paragraph 10 of the Findings of Fact the formula for the computation of plaintiff's costs, used by the Board in arriving at a charge back (reduction in contract price) because of deletion of spare parts and tools, is revised so as to eliminate a profit factor [2] and to reduce general administration expense. This results in a reduced charge back against the contract price for the deleted spare parts and tools.

It follows then that there is due plaintiff on its claim (1) for spare parts and tools the sum of $1,085.40, representing the difference between the amount computed under the formula used by the Armed Services Board of Contract Appeals as the charge back for the deleted spare parts and tools, and the amount of such charge back recalculated in the revised formula.[3]

(2)

Excess Weight

Plaintiff claims the sum of $483.23 which was withheld from contract payments by defendant for transportation charges due to weight of the refrigeration units in excess of the following provision of the contract:

GUARANTEED SHIPPING WEIGHT:
1,900 lbs. each—Item 3
1,500 lbs. each—Item 2

The controversy on this claim centers on Item 2 which was the electric motor driven refrigeration unit.

Plaintiff's position in essence is that design changes which plaintiff alleges were "required" by the Government in the refrigeration units under provisions of the contract documents relating to design and construction, caused the excess

[2] Elimination of a profit factor on deleted items is necessary in order to avoid loss to plaintiff resulting from the deletion. For discussion of proper formula for equitable adjustment in a "loss contract" situation, see comments under claim (3) *infra*.

[3] There is an established line of cases in which the criteria, measures, ingredients, or rules of damages are treated as matters of law. *Laburnum Construction Corp.* v. *United States*, 163 Ct. Cl. 339, 325 F. 2d 451 (1963); *The Lilley-Ames Co.* v. *United States*, 154 Ct. Cl. 544, 293 F. 2d 630 (1961).

weight and thus plaintiff should not be held to the guaranteed weight.

The contract documents required plaintiff to submit to the contracting officer drawings covering the assembly of the entire refrigeration unit and further provided that fabrication should not commence until the drawings had been approved. The contract documents also required plaintiff, before commencing production, to submit to defendant a preproduction sample for approval, and that the sample meet certain tests. The contract specifications provided:

> 3.4 Design and construction.—Design and construction shall conform in general with the attached drawings and as hereinafter specified.
>
> * * * * * *
>
> 3.4.2 Construction.—* * * The net weight, exclusive of refrigerant, gasoline, oil and water, shall not exceed 1500 pounds.

Plaintiff submitted three designs which were rejected by defendant. Thereafter, plaintiff's representative and defendant's representative conferred "on several of the disputes then existing" at the office of the Quartermaster General. Plaintiff's representative subsequently testified before the Armed Services Board of Contract Appeals that in coming to an agreement with defendant's representatives regarding a design "insisted upon by the Government" plaintiff accepted a design which resulted in substantially heavier units than the units would have been under the design which plaintiff had previously submitted. As noted in the Findings, however, (paragraph 13(b)) there is no evidence that the design which was approved by defendant's representatives was outside the contract specifications or that defendant's representatives acted in bad faith or in an arbitrary manner in rejecting the designs plaintiff submitted or in working out with plaintiff's representative an acceptable design; nor does the evidence establish that plaintiff could not have produced the units in compliance with the approved design without exceeding the guaranteed shipping weight.

Further light is shed on the intent of the parties by an inspection report of April 2, 1953, at the time of the rejection of the first pilot model. This report stated, "* * *

Previous authorization was given to employ a steel frame if the weight limitation was not exceeded." (Emphasis added.)

On March 30, 1956, the Armed Services Board of Contract Appeals affirmed the decision of the contracting officer that plaintiff was liable for the excess shipping costs.

In attempting to prevail on this claim in the face of the clear contract provision on guaranteed weight, plaintiff assumed the burden of establishing that some act or conduct on the part of defendant intervened to relieve it of compliance with the provision. The Board did not find any such act or conduct on defendant's part. The Board pointed out that no claim was made by plaintiff that the design requirements called for anything beyond the specifications.

It cannot be said from the facts of this case, moreover, that the acceptance by defendant of units which were in excess of the specification weight limitations constituted a waiver by defendant of the separate contract provisions requiring plaintiff to pay for transportation charges due to the excess weight.

The evidence from the entire administrative record which is before the court falls short of establishing a basis for setting aside the plain wording of the contract, and, accordingly, plaintiff's claim (2) must be denied.

(3)

Change Order No. 2

Of the four contracts awarded to plaintiff for the production of the 270 refrigeration units, one of the contracts was for 100 electric driven units and 100 gasoline driven units. All of the units called for in the other three contracts were to be electric driven. The contract price for the gasoline driven units was $1,720 each and the contract price for the electric driven units was $1,271 each, or $449 less per unit.

In June 1953 before plaintiff had produced any gasoline driven units, the contracting officer wrote to plaintiff that in accordance with the Changes article of the contract the 100 gasoline driven units were to be changed to 100 electric driven units.[4] By responding letter, plaintiff advised that it was

[4] The formal change order was issued on October 9, 1953.

agreeable to the change and would allow a credit of $28,600 against the contract price. Shortly thereafter, plaintiff wrote to defendant that it would increase the credit to $32,850. The contracting officer considered that the contract price should be reduced by the difference in contract price of the two types of units; in other words, that the reduction should be 100 times $449, the difference between $1,720 and $1,271, or $44,900.

Plaintiff then made revision in its request for contract adjustment because of the change order by requesting an increase in the unit price of the changed units. Its ultimate position was that it was entitled to a price adjustment of $1,919.51 per unit for the 100 changed units, representing cost (including extra compensation for spare parts and tools), plus profit. This was, of course, higher than the contract price of either the electric or gasoline units.

A Government audit which is amply supported by the record revealed that although the unit contract price on the electric refrigerators was $1,271 and the unit contract price on the gasoline refrigerators was $1,720, plaintiff's costs on the electric refrigerators were $1,603.58 and on the gasoline refrigerators were $1,868.80. Plaintiff was therefore sustaining a unit loss of $332.58 on the electric refrigerators as against a unit loss of $148.80 on the gasoline refrigerators.

The contracting officer in his decision of March 19, 1954, adjusted the contract price to allow a unit price of $1,369.82 for the changed units. (Finding 22). This was a higher unit price than the contract price of the electric units.

The Armed Services Board of Contract Appeals, after timely appeal and hearing on this and the other claims of plaintiff embraced in this suit, adjusted the unit price of the changed units to $1,763.94 which represents plaintiff's cost ($1,603.58) plus 10 percent profit for producing each of the changed units. (Finding 23).

In this suit, plaintiff asserts that (a) the substitution of electric units for gasoline units is outside the scope of the Changes article of the contract, that defendant's action in making the change was therefore a breach of contract, and that the measure of damages is the reasonable value of the end product; and (b) even if the change order is valid, plaintiff is entitled to a higher allowance of unit cost than the

cost allowed by the Board. Plaintiff claims that under either theory it is entitled to a unit price of $1,919.51 on the change units.

Defendant asserts that the formula used by the Armed Services Board of Contract Appeals was legally erroneous and that under its counterclaim defendant is entitled, as a matter of law, to a downward equitable adjustment of the original contract price. Defendant's position is that the change was within the contract and, since the change was from an item of greater value (gasoline driven units with a production cost value of $1,868.80) to an item of lesser value (electric driven units with a production cost value of $1,603.58), there should be a reduction in the unit contract price of the difference in cost between the two, or $265.22; and that the unit price for the change units should have been $1,720 (contract price of gasoline units) less $265.22, or $1,454.78. If defendant is correct, it is entitled to recover on its counterclaim the difference in adjusted unit price allowed by the Board ($1,763.94) and the unit price which defendant claims is proper ($1,454.78) or $309.16 per unit, making a total for the 100 changed units of $30,916.

If the question presented involves a breach of contract it would, of course, be outside the operative effect of the Disputes article of the contract and, hence, the court in resolving the question would not be subject to the strictures of *Bianchi*. Likewise, if the question presented involves the legal sufficiency of a formula used in determining damages the court would make its determination independently of the action of the administrative Board. (See cases cited under claims (1) and (2), *supra*.)

The Changes article of the contract provided:

> 2. CHANGES
>
> The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjust-

ment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however,* That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

The formal change order which was issued on October 9, 1953, provided:

1. Pursuant to the authority contained in General Provision 2 titled 'Changes' of Contract DA 11-009-QM-19174 entered into under date of 6 June 1952 between the United States of America and Keco Industries, Inc., the provisions of said contract as heretofore modified by Supplemental Agreement No. 1 are further amended as follows:

For Item 3, 100 each Refrigeration Units Gasoline Engine Driven shall be converted to Refrigeration Units Electric Motor Driven in accordance with Military Specification MIL-R-11676 (QMC), dated 4 January 1952.

2. By reason of these changes, the nomenclature of Item No. 3 is amended, as follows:
Refrigeration Unit (For Refrigerated Warehouses), vertically mounted, Electric Motor Driven 220 Volts, 3 phase, 60 Cycles AC in accordance with Military Specification MIL-R-11676 (QMC), dated 4 January 1952 and exceptions as indicated in the Schedule (Stock No. 66-R-292-550).

3. By reason of these changes, Items Nos. 3a and 3b are deleted.

4. By reason of these changes, the provisions prescribing the compensation to be paid under said contract including the Guaranteed Shipping Weight and the provisions relating to delivery shall be subject to an equitable adjustment and if the parties fail to agree with respect thereto, such failure shall be treated as a dispute within the meaning of General Provision 12 of the contract, titled 'Disputes'.

> 5. Except as hereby amended, all of the terms and conditions of the said contract shall remain unmodified and in full force and effect and shall also apply in carrying out the provisions of this Order.

Plaintiff contends that because of differences between gasoline and electric driven units the change order was invalid and that the attempted change from gasoline to electric driven units constituted a breach of contract. Plaintiff produced testimony before the Board on certain differences between the two types of refrigerators, but the evidence establishes that the only essential or significant difference was in the power units which plaintiff purchased fully assembled. The overall dimensions of the two types of refrigerators and most basic parts were the same.

Since the right to make changes was reserved to defendant, it cannot be liable for breach of contract for its exercise of that right, unless the changes were cardinal changes and exceeded the discretion which the Changes article vested in the contracting officer. See *Aragona Construction Company, Inc.* v. *United States*, 165 Ct. Cl. 382 (1964).

The reported decisions do not establish clear lines of demarcation between changes which may be said to come properly within the Changes article of Government contracts and cardinal changes which constitute breaches of contract. Certain guide lines in the decided cases are, however, helpful in determining how a given change should be regarded. In *Saddler* v. *United States*, 152 Ct. Cl. 557, 561, 287 F. 2d 411 (1961), the court stated:

> We think that a determination of the permissive degree of change can only be reached by considering the totality of the change and this requires recourse to its magnitude as well as its quality.

The court held that the change which required a 100 percent increase in the amount of earth to be moved was a cardinal change constituting a breach of the contract. In arriving at its conclusion the court considered the original tenor of the contract versus the contract as changed and found that the original purpose of the contract had been substantially changed.

In *Aragona Construction Company, Inc.*, *supra*, at 390–91, the court stated:

> In deciding whether a single change or a series of changes is a cardinal change and a breach of the contract, we must look to the work done in compliance with the change and ascertain whether it was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct.
>
> * * * In contrast, the cases that have held the changes ordered by the contracting officer to be cardinal changes and, hence, not permitted under the contract, have involved changes that altered the nature of the thing to be constructed. * * *

In the instant case, volume was not increased. No new item unknown to plaintiff was required. Plaintiff was geared to production of the electric driven units and had not produced any gasoline driven units and, as noted above, the two types of refrigerators were essentially the same except for the power units which plaintiff purchased fully assembled. It is concluded that the change from 100 gasoline to 100 electric driven refrigerators was not a cardinal change and, accordingly, that defendant did not breach the contract in issuing the change order.

We proceed then to the determination of the proper formula to be used in an equitable adjustment within the terms of the contract because of the change from the 100 gasoline driven units to the 100 electric driven units.

A paramount fact is that the deleted gasoline driven units, with a unit contract price of $1,720 and a unit production cost of $1,868.80 were of greater value than the substituted electric driven units, with a unit contract price of $1,271 and a unit production cost of $1,603.58. The unit contract price of the gasoline driven units exceeded the unit contract price of the electric driven units by $450 and the unit production cost of the gasoline driven units exceeded the unit production cost of the electric driven units by $265.22.

In support of its position plaintiff cites a number of cases, none of which has factual situations comparable to the instant case. In *Tobin Quarries, Inc.* v. *United States*, 114 Ct. Cl. 286, 84 F. Supp. 1021 (1949), cited by plaintiff; the contractor was obliged to perform certain work with a higher priced rock because the Government had mistakenly thought that cheaper rock was available. The court held that the con-

tractor should not be penalized by a reduction in contract price because the cheaper rock was not in fact available. Other cases cited by plaintiff on this issue involve either actions by the Government outside the scope of the contract or are otherwise so different in facts as to be inapplicable.

Defendant places its reliance on this issue exclusively on *S. N. Nielsen Co.* v. *United States*, 141 Ct. Cl. 793 (1958), in which the contractor entered into a Government contract based on a grossly improvident bid to perform certain construction work. The value of a segment of the work (outside utilities), based upon what it would have cost the contractor to do it, plus overhead and profit would have been $60,690, but the contractor mistakenly estimated $34,800 in making its bid for this work. A few days after the contract was entered into, the contracting officer advised the contractor of a proposed change eliminating certain type construction and substituting less expensive construction in the outside utilities. The contracting officer requested the contractor to submit a credit proposal for the labor and materials involved in the change. Thereafter, the contracting officer issued a formal change order, which the contractor accepted by endorsement, and which stated that an equitable adjustment under the terms of the Changes article of the contract would be determined at a later date. Whereupon, the contractor performed the work in accordance with the change order. The cost of the work as changed was $19,180. This left a difference of $41,510 between the value of the work as originally contracted for ($60,690) and the value of the work as changed. The contractor proposed to credit the Government with $18,000. The contracting officer determined that the equitable adjustment should be the $41,510 and the contract payment to the contractor was reduced by that amount. After the Armed Services Board of Contract Appeals had affirmed the contracting officer's decision the contractor brought suit in this court. The opinion of the court reads in part at 796-97:

> The plaintiff points to its losses under the outside utilities electrical portions of its contract. However, its losses would have been the same if the change order had not been issued, since it finds no fault with the contracting officer's figures as to the costs as they would have been without the change order and the costs as

they were under the change order. The plaintiff suggests that the change order was not permissible under the contract. If that were true it would be immaterial since, as appears above, the change order did not increase the plaintiff's losses. In any event, the change was 'within the scope of the contract' and was accepted by the plaintiff. The only dispute was in regard to the amount of the equitable adjustment.

The plaintiff says that, of the mistakenly small amount of $34,800 which it estimated for all of the outside electrical work in making its bid, only $22,564.32 was properly applicable to the line from the Alert Hangar to manhole No. 2. It says that the $19,180 actual cost of the changed work should have been subtracted from the $22,564.32, and only the difference of $3,384.32 should have been deducted from the plaintiff's contract price. We think the $22,564.32 figure is of no significance. It is only an allocation of a proportionate part of a larger sum which was itself grossly inadequate because of the mistake in the bid. The plaintiff's attempt to use it is only another way of seeking reformation of the contract on account of its unilateral mistake in making the contract. As we have seen, the plaintiff disclaims, rightly we suppose, any entitlement to a direct reformation of the contract on account of the mistake. We think it is not entitled to use its mistaken estimated figures, which have no relation to actual costs, in determining the equitable adjustment.

The plaintiff's petition will be dismissed.

More recently, in *Bruce Constr. Corp.* v. *United States*, 163 Ct. Cl. 97, 32 F. 2d 516 (1963), the court made pronouncements on the purpose of an equitable adjustment which give further guidance in resolving the question of an equitable adjustment in the instant case. Both the basic facts and pertinent segments of the court's views are contained in the following excerpt from *Bruce Constr. Corp.* v. *United States*, *supra*, at 100:

> Though the price which plaintiffs actually paid for the 'sand block' was the same as they would have paid for the original block selected, they contend that the fair market value of the sand block was greater than the purchase price. Essentially then, plaintiffs argue that defendant should not benefit from the bargain price plaintiffs secured from their supplier, but should pay for the actual value of the sand block received by defendant, not merely its actual cost.

> Though there is substantial controversy as to the market value of the sand block as of the time of the transaction between plaintiffs and their supplier, for purposes of defendant's motion for partial summary judgment, we are called upon only to decide the narrow question whether 'cost' or 'fair market value' controls in the award of an equitable adjustment.
>
> Equitable adjustments in this context are simply corrective measures utilized to keep a contractor whole when the Government modifies a contract. Since the purpose underlying such adjustments is to safeguard the contractor against increased costs engendered by the modification, it appears patent that the measure of damages cannot be the value received by the Government, but must be more closely related to and contingent upon the altered position in which the contractor finds himself by reason of the modification. * * *

In *Nielsen*, the court points out that "the change did not increase plaintiff's losses." In *Bruce Construction*, the court notes that "the underlying purpose of such adjustments is to safeguard the contractor against increased costs engendered by the modification." In the instant case, if there had been no change order plaintiff would have lost $148.80 per unit in manufacturing the gasoline driven units ($1,868.80, cost, less $1,720 contract price). If the unit price because of the change order is reduced by $265.22, the difference between production cost of the electric and the gasoline driven units with a resulting adjusted unit price for the changed units of $1,454.78, then plaintiff's loss because of the change order would be $148.80 ($1,603.58, cost, less $1,454.78) which is the same unit loss which plaintiff would have had if there had been no change order. In other words, in the formula which defendant advocates under its counterclaim, the change would not, in the *Nielsen* language, increase plaintiff's losses; nor would the change, in *Bruce Construction* language, cause increased costs engendered by the modification. It is concluded that the formula proposed by defendant for the equitable adjustment is correct under the principles announced in *Nielsen* and *Bruce Construction*.

It is accordingly concluded that the adjusted unit contract price of the 100 changed units should be $1,454.78 which represents the contract price of the gasoline driven units ($1,720) less $265.22 which is the difference between the

production cost of the two type units, and that defendant should be allowed to recover on its counterclaim the difference in adjusted unit price allowed by the Board ($1,763.94) and the unit price of $1,454.78 or $309.16 per unit, making a total recovery on the counterclaim of $30,916.

In summary, it is recommended that judgment be entered on defendant's counterclaim for $30,916 less $1,085.40, being the amount found due plaintiff on its claim (1) for spare parts and tools, or $29,830.60.

Findings of Fact

1. (a) Plaintiff, a corporation organized and existing by virtue of the laws of the State of Ohio, with its principal offices in Cincinnati, Ohio, is and was at all pertinent times engaged as a manufacturer of specialized air conditioning equipment.

(b) This case arises out of four contracts awarded on June 6, 1952, to plaintiff by defendant acting through the U.S. Army Chicago Quartermaster Depot, for the production and delivery of 270 refrigeration units as follows:

Contract No.	Item	Quantity	Unit Price	Total Price
DA 11-009-QM-19168..	Refrigerating Unit (electric)..	6	$1,271.00	$7,626.00
DA 11-009-QM-19170..	Refrigerating Unit (electric)..	42	1,271.00	53,382.00
DA 11-009-QM-19172..	Refrigerating Unit (electric)..	22	1,271.00	27,962.00
DA 11-009-QM-19174..	Refrigerating Unit (electric)..	100	1,271.00	127,100.00
	and Refrigerating Unit (gasoline).	100	1,720.00	172,000.00

(c) All of the contracts as amended were satisfactorily performed.

(d) The only evidence in the case is the administrative record which was received in evidence in a pretrial conference, at which time plaintiff's counsel announced that in proving his case he would rely exclusively on the administrative record and did not intend to offer any *de novo* evidence.

2. (a) Plaintiff makes three claims which are in essence:

(1) That plaintiff had no contractual obligation to furnish certain spare parts and tools and, hence, should receive extra compensation for them and should not be charged for certain tool and part deletions and substitutions;

(2) That design changes required by defendant caused excess weight and accordingly that plaintiff should not be

held liable for transportation charges for weight in excess of the guaranteed weight; and

(3) That Change Order No. 2 issued by defendant for the change of 100 units from gasoline to electric motivating power was violative of the contract and that consequently plaintiff is entitled to recover on a *quantum meruit* basis for an amount in excess of the amount allowed by the Armed Services Board of Contract Appeals as an equitable adjustment.

(b) Defendant, in addition to controverting plaintiff's claims, seeks recovery under its counterclaim on the theory that the formula used by the Armed Services Board of Contract Appeals in deciding plaintiff's claim (3) above was erroneous as a matter of law.

3. All of the contracts contained the General Provisions for supply contracts, Standard Form 32, November 1949 Edition, which included the following Changes and Disputes articles:

2. CHANGES

The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes, within the general scope of this contract, in any one or more of the following: (i) drawings, designs, or specifications, where the supplies to be furnished are to be specially manufactured for the Government in accordance therewith; (ii) method of shipment or packing; and (iii) place of delivery. If any such change causes an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made in the contract price or delivery schedule, or both, and the contract shall be modified in writing accordingly. Any claim by the Contractor for adjustment under this clause must be asserted within 30 days from the date of receipt by the Contractor of the notification of change: *Provided, however*, That the Contracting Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. Failure to agree to any adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled 'Disputes.' However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

* * * * *

12. DISPUTES

Except as otherwise provided in this contract any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. Within 30 days from the date of receipt of such copy, the Contractor may appeal by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary, and the decision of the Secretary or his duly authorized representative for the hearing of such appeals shall be final and conclusive: *Provided*, That if no such appeal is taken, the decision of the Contracting Officer shall be final and conclusive. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(1)

Spare Parts and Tools

4. Provisions of the contract documents pertinent to spare parts and tools were as follows:

(a) MIL-R-11676 (QMC), Electric Motor Units:

3.5.8 Spare parts and tools.—

3.5.8.1 Spare parts.—The refrigerating system shall be shipped complete with the following spare parts:

COMPRESSOR PARTS

	Quanity [sic]
Set of gaskets consisting of cylinder head, valve mounting gaskets, and one each of other special gaskets peculiar to the contractor's compressor design	1
Shaft seal assembly—complete. (If used)	1
Valve plate assembly—suction	1
Valve plate assembly—discharge	1

MISCELLANEOUS PARTS

Compressor oil—in quart cans	4
Piston set (complete with sleeves, pins, etc.)	1
Belts, fan and blower sets	2
Belt governor drive. (If used)	1
Gage compound—30 inch	1
Vacuum to 100 pounds	1
Dehydrator (60 cu. in.)	1
Dehydrator refill—1 pound can	1
Expansion valve. (10 F. super-heat, factory set)	1

3.5.8.2 Tools.—Each refrigerating system shall be shipped complete with the folowing tools:

SPECIAL MAINTENANCE TOOLS

	Quanity [sic]
Flare Nut Wrench ¾ inch x 1 inch	1
Flare Nut Wrench ⅞ inch x 1⅛ inch	1
Compound Gauge with Attachments	1
Pressure Gauge with Attachments	1
Refrigeration Ratchet Wrench	1
Adapter ¼ inch x ⅜ inch	1
Prestolite Leak Detector Assy	1
Prestolite Torch Tip	1
Prestolite Tank (Type MC)	1
Prestolite Tank Pressure Regulator (Type MC)	1
Charging Line 12 Ft. Long	1
Freon Drum Adapter Fitting	1
Funnel—Oil or Gas	1
Screw Driver, Phillips 6 inches	1
Pliers 6 inches	1

(b) MIL-R-11853 (QMC), Gasoline Motor Units:

3.4.8. Spare parts and tools.—

3.4.8.1 Spare parts.—The refrigerating system shall be shipped complete with the following spare parts:

COMPRESSOR PARTS

	Quan.
Set of gaskets consisting of cylinder head, valve mounting gaskets, and one each of other special gaskets peculiar to the contractor's compressor design	1
Shaft seal assembly—complete	1
Valve plate assembly—suction	1
Valve plate assembly—discharge	1

MISCELLANEOUS PARTS

Compressor oil—in quart cans	4
Piston set (complete with sleeves, pins, etc.)	1
Belts, fan and blower, sets	2
Belt governor drive (if used)	1
Gage compound—30 inch vacuum to 100 pound	1
Dehydrator—60 cubic inch	1
Dehydrator refill—1 pound can	1
Expansion valve—10 F. super-heat, factory set	1

3.4.8.2 Tools.—Each refrigerating system shall be shipped complete with the following tools:

SPECIAL MAINTENANCE TOOLS

	Quan.
Flare Nut Wrench ¾ inch x 1 inch	1
Flare Nut Wrench ⅞ inch x 1⅛ inch	1
Compound Gage with attachments	1
Pressure Gage with attachments	1
Refrigeration Ratchet Wrench	1
Adapter ¼ inch x ⅜ inch	1
Prestolite Leak Detector Assy	1
Prestolite Torch Tip	1
Prestolite Tank (Type MC)	1
Prestolite Tank Pressure Regulator (Type MC)	1
Charging Line 12 Ft. Long	1
Freon Drum Adapter Fitting	1
Funnel—Oil or Gas	1
Screw Driver, Phillips 6 inch	1
Pliers, 6 inch	1

(c) Amendment No. 4, dated 9 April 1952, to IFB QM 11-009-52-1089:

6. The 'INSTRUCTIONS FOR THE PREPARATION OF COMBINED REFERENCE DATA LISTS AND PHOTOGRAPHIC ILLUSTRATIONS', DATED 1 APRIL 1952, is incorporated herein by reference and made a part hereof.

7. CONCURRENT SPARE PARTS—MAPI

The right is reserved to the Government to select such items from the 'Combined Reference Data List' as it may deem appropriate and/or to add such items as components, parts, tools, etc., as may be required, to be shipped concurrently with each end item, in accordance with Section III, Part I and III of 'Instructions for the Preparation of Combined Reference Data Lists and Photographic Illustrations' dated 1 April 1952.

8. CONCURRENT DEPOT SPARE PARTS SETS

The Government reserves the right to purchase concurrent Depot Spare Parts Sets in accordance with Section III, Parts II and III of 'Instructions for the Preparation of Combined Reference Data Lists and Photographic Illustrations' dated 1 April 1952.

9. PURCHASE OF SPECIAL PURPOSE EQUIPMENT

It is the intention of the Government to purchase the special purpose equipment as provided for in the Schedules herein on the following basis:

(a) Purchase of end items (Refrigeration Unit, Items 2 and 3).

(b) Purchase of Combined Reference Data List (Items 2a and 3a).

(c) Purchase of Photographic Illustrations (Items 2b and 3b).

(d) Option to purchase Concurrent Spare Parts MAPI as provided in Part I and Part III of Section III herein.

(e) Option to purchase Concurrent Depot Spare Parts Sets as provided in Part II and III of Section III herein.

Bidders will be required to enter on bids unit and total prices on End Items, total price for Combined Reference Data Lists and total price for Photographic Illustrations. Bids will be evaluated based on the combined total costs of End Items, Combined Reference Data Lists, and Photographic Illustrations.

* * * * * *

EXCEPTIONS TO SPECIFICATION MIL–R–11676 (QMC):

Delete exceptions to Specification MIL–R–11676 (QMC) on pages 3 and 4 of the Schedule and substitute the following:

* * * * * *

22. Par. 3.5.8.1—Spare parts—Delete 'compressor parts' shown on page 12 and at the top of page 13. Also, under miscellaneous parts delete items '1 and 4'.

(d) INSTRUCTIONS FOR THE PREPARATION OF COMBINED REFERENCE DATA LISTS AND PHOTOGRAPHIC INSTRUCTIONS, dated 1 April 1952:

SECTION I

GENERAL

1. Contracts for purchase of Special Purpose Vehicles or Special Purpose Equipment will provide for essentially five elements as follows:

a. Purchase of End Items.
b. Purchase of Combined Reference Data Lists.
c. Purchase of Photographic Illustrations.
d. Purchase of Material to accompany parent (end) items (short term MAPI).
e. Option to purchase concurrent Depot Spare Parts Sets.

* * * * * *

SECTION II

PROVISIONS RELATIVE TO THE COMBINED REFERENCE DATA LIST AND PHOTOGRAPHIC ILLUSTRATIONS

1. The contractor will furnish five (5) complete Combined Reference Data Lists, each consisting of a detailed Cataloging Parts List and Special Hand Tools List, as more particularly described hereinafter, to the Contract-

ing Officer, to arrive not later than the 30th day from date of approval of Preproduction sample. The combined reference data lists will be forwarded by the Contracting Officer to OQMG for use in cataloging and in preparation of the concurrent Depot Spare Parts Sets list to be submitted to the Contracting Officer as further set forth in part III of Section III, hereinafter.

* * * * * *

(b) The special hand tools list shall be prepared on bond paper (original and four (4) copies) and shall cover all special hand tools required to adjust or maintain the end items. This list will include a description of each tool, its purpose, quantity required, actual manufacturer's name and actual manufacturer's identification number.

(c) The five Combined Reference Data Lists referred to above shall contain one each of the Cataloging Parts List and Special Hand Tools List. Each reference data list shall have a cover sheet which shall include the vehicle manufacturer's model designation (letters, numbers or a combination of both), contract number, and quantity figure of the end items covered by the contract.

* * * * * *

SECTION III

PROVISIONS RELATIVE TO PURCHASE OF MAPI AND CONCURRENT DEPOT SPARE PARTS

PART I MAPI

Material accompanying parent item (MAPI) is defined as those parts and tools generally required to be packed and shipped with each end item. In those instances where lists of MAPI are included in the Specifications or Purchase Description, the Government reserves the right to add spare parts and/or tools to those lists for shipment with the end item. The Government further reserves the right to cancel any parts or tools listed in the specification or purchase description in the event those parts or tools do not apply to the end item(s) under purchase.

Part II. Concurrent Depot Spare Parts Sets

1. The contractor hereby grants to the Government during the term of the contract an option to purchase Depot Spare Parts Sets for the vehicle(s) or equipment under contract, the value of such spare parts sets not

to exceed 15% of the value of the end items plus the value of Combined Reference Data lists and photographic illustrations.

2. One Spare Parts Set shall be delivered concurrently with each group of 25 end items. In the event a Parts Set is not delivered concurrently with a group of 25 end items the Government shall have the right to refuse to inspect or accept any more end items, and to withhold all payments which might be otherwise due the contractor until the deficient delivery of Concurrent Depot Spare Parts Sets shall have been corrected by the Contractor, unless the Government shall authorize delivery of end items without concurrent delivery of Spare Parts Sets. Such refusal to inspect or accept end items shall not constitute an excusable delay under any article relative to default.

* * * * *

5. (a) Plaintiff contends that certain spare parts and tools listed in the specifications for each type refrigeration unit (electric or gasoline) could not be used for that type, but the evidence does not sustain this contention. The weight of the evidence is that the list of spare parts and tools for each type of refrigeration unit contained spare parts and tools which were usable in connection with that type.

(b) Sometime prior to June 6, 1952, (the date of the award of the contracts) representatives of plaintiff attended a pre-award conference with representatives of defendant at the Chicago Quartermaster Depot at which time there was discussion between the parties which included, among other things, spare parts and tools under another procurement. Defendant's representatives advised plaintiff that spare parts and tools were not required under the other procurement, the specifications of which were not accompanied by a list of parts and tools as were the specifications of the instant contracts.

A letter dated July 20, 1953, to defendant from plaintiff reads in part:

> There is no argument that Specification MIL–R–11676 sets forth spare parts to be shipped with each refrigerating system, but the same requirement is included in Specification MIL–R–2421 about which we made inquiry prior to bidding and after award, and were informed that spare parts and tools would be procured under the option provisions of the contract. It

may have been a mistake not to have specifically referred to MIL–R–11676 when our inquiries were made, but the fact is that we assumed the answer was generally applicable, and this seems also to be the impression of the Catalog Agency.

* * * * *

The weight of the creditable evidence is that spare parts and tools under the instant contracts were not discussed at the conference.

6. (a) On March 28, 1953, plaintiff submitted a pilot model refrigeration unit to defendant's inspectors, but without spare parts or tools.

(b) On April 2, 1953, the pilot model was rejected in writing by defendant's agent who listed 17 deviations, but made no reference to spare parts or tools.

(c) On May 8, 1953, defendant approved plaintiff's pilot model which was submitted without spare parts or tools.

(d) On May 8, 1953, and on May 22, 1953, shipments of refrigeration units without spare parts or tools were accepted from plaintiff by defendant and paid for in full, without deduction because of absence of spare parts or tools.

(e) The evidence establishes that (1) the absence of spare parts and tools was orally called to the attention of plaintiff's agent by defendant's agent at the time of the inspection of the pilot model and that the plaintiff's agent assured defendant's agent that the spare parts and tools would follow; and (2) defendant's purchasing agent had no knowledge that the shipments of May 1953 did not include spare parts and tools.

7. (a) On July 1, 1953, plaintiff's and defendant's agents discussed the question of whether plaintiff was obliged to furnish spare parts and tools under the contracts. Defendant's agent asserted that spare parts and tools were included in the contract price while plaintiff's agent maintained that they were optional items to be paid for in addition to the contract price. Plaintiff agreed to commence shipment of the spare parts and tools on or about August 1, 1953, but reserved the right to take exception to any determination that such spare parts and tools were within the contract price.

(b) The body of a telegram dated July 8, 1953, addressed to the Chicago Quartermaster Depot from plaintiff reads:

RE CONTRACT 19174 REQUEST YOUR AUTHORIZATION INSPECTORS TO ACCEPT UNITS WITHOUT SPARE PARTS AND TOOLS SAME BASIS AS FIRST TWO SHIPMENTS.

(c) The body of a responding telegram, also dated July 8, 1953, to plaintiff from defendant reads:

REFERENCE YOUR TELEGRAM 8 JULY 1953 PERMISSION GRANTED TO SHIP TO FT. LEE, VIRGINIA, ONE EACH 10,000 BTU ELECTRIC UNIT ON CONTRACT DA 11–009–QM–19174 WITHOUT SPARE PARTS AND TOOLS PROVIDED SPARE PARTS AND TOOLS FOLLOW. ADVICE IS REQUESTED WHEN SPARE PARTS AND TOOLS WILL BE AVAILABLE FOR 18 UNITS PREVIOUSLY SHIPPED AND FUTURE SHIPMENTS.

8. (a) By telegram dated July 24, 1953, plaintiff was advised by defendant that a temporary withholding of $100 per refrigeration unit was being effected until the spare parts and tools were shipped.

(b) By letter dated July 28, 1953, plaintiff protested to defendant the above withholding.

(c) During the month of August 1953, the parties continued an exchange of letters in which they maintained their respective positions regarding the spare parts and tools.

9. (a) By letter dated September 29, 1953, addressed to plaintiff from defendant's agent, certain deletions and substitutions were made in the tools. The letter continued:

* * * * * *

Confirming previous authorizations, authority is hereby granted to ship all the units on Contracts DA 11–009 qm–18169, 19170 and 19172 without spare parts accompanying the refrigeration unit. This authorization was granted for your confenience [sic] and at your request to facilitate shipment of the refrigeration units. However, the spare parts and tools described in the specification, as modified by this letter, are a definite contract requirement as previously explained in letter from this Office, dated 13 July 1953, and letter, dated 21 July 1953. It is further understood that these spare parts and tools will be shipped to the various destinations to which the refrigeration units were shipped on the contracts listed above before final shipment is made on Contract DA 11–009 qm–19174.

Each set of the said parts and tools must be individually packaged and packed so that when they are shipped to a depot, each set may be attached to a corresponding unit preparatory to shipment to its ultimate destination.

Each individual set of tools must be properly identified as to its contents. Shipments to the various stations of the spare parts and tools should be cross referenced to the shipment of units by bill of lading number and date of shipment.

In view of the above changes in specifications, it is requested that you submit at your earliest possible convenience the reduction in contract price for deletion of the said tools and parts and the increase in price due to the addition of the said tool. This information should be supported by ample cost data, such as copies of invoices or other substantiating data to establish that the net price reduction you offer is fair and reasonable.

(b) Following further exchanges of correspondence between the parties on the subject of spare parts and tools, plaintiff under date of February 18, 1954, wrote to defendant requesting $78.07 per unit for spare parts and tools which plaintiff had provided defendant with 100 refrigeration units, minus the cost of certain deletions.

10. (a) On March 19, 1954, defendant's contracting officer issued and sent to plaintiff findings of fact and his decisions with respect to various items under the contracts, including "a. Equitable adjustment of price under each of subject contracts because of deletion of certain spare parts required by such contracts;", and reading in part:

For the reason set forth above, it is the finding of the undersigned that your company is required under the terms of the contracts, to supply the spare parts and tools provided in paragraph 3.5.8 of the specification, and, accordingly, it is the finding of the undersigned that your company is not entitled to any increase in the prices of the contracts because of the furnishing of spare parts and tools required by the specification, as amended.

It is the further finding of the undersigned that because of the deletions and substitutions in the requirement for spare parts and tools as contained in letter, dated 17 February 1953, there was a decrease in the cost of performance under subject contracts, in the amount of $25.06 per unit. Computation of such amount is set forth in Cost and Price Analysis Report, dated 4 January 1954, which is adopted by the undersigned and made a part of these findings by reference. It is the finding of the undersigned that the price of subject contracts should be decreased as follows:

Contract Nos.	Units	Unit Price Adjustment	Amount
qm-19168	6	$25.06	$150.36
qm-19170	42	25.06	1,052.52
qm-19172	22	25.06	551.32
qm-19174	200	25.06	5,012.00
Total	270		6,766.20

(b) On March 29, 1954, plaintiff appealed to the Secretary of the Army from the decision of the contracting officer.

(c) On March 9 and March 10, 1955, a hearing on plaintiff's appeal was held before Division 4, Army Contract Appeals Panel in Washington, D.C. Both plaintiff and defendant were represented by counsel and adduced testimony. Numerous exhibits offered by both parties were received in evidence.

(d) On March 30, 1956, the Armed Services Board of Contract Appeals rendered its opinion reading in part:

> Although Amendment 4 to the Invitation provided for the right of the Government to purchase additional parts and tools, the requirements for spare parts and tools as set forth in paragraphs 3.5.8.1 and 3.5.8.2 (supra) were not withdrawn by the addition of these option provisions, except the compressor parts and the two miscellaneous parts, which were deleted. In our opinion the foregoing provisions required the appellant to furnish the specified spare parts and tools, which included piston sets, a funnel and a Phillips screwdriver. Credit for a regular screwdriver in place of the Phillips screwdriver, and an adapter in the amounts of 29 and 80 cents respectively were credited to appellant in the Government's computation on the charge back of $25.06 per unit.
>
> That portion of appellant's appeal pertaining to spare parts and tools is accordingly denied.

(e) The computation of plaintiff's costs, used by the Board in arriving at the charge back of $25.06 per unit (as appears in the Board's opinion, *supra*) to be deducted from the contract price because of the deletion of spare parts and tools, employs a figure of 15 percent as general and administration expenses. In a similar computation in connection with plaintiff's claim (3) (relating to Change Order No. 2), the Board used a figure of 6.23 percent as general and administration expenses. The 6.23 percent figure is supported by the best evidence of record. The Board also included in its computation a profit factor of 10 percent, but the evidence establishes

that plaintiff was losing money on the contracts and, hence, no profit factor is includable.

(f) A recalculation of the per unit charge back (reduction in contract price) using a figure of 6.23 percent as general administration expenses and with the elimination of the profit factor is as follows:

Manufacturing Cost of Items Deleted, after credit for additions	$19.81
Add: General and Administration (6.23%)	1.23
Per unit	21.04

As appears in the Board's opinion, *supra*, the Board concluded that a charge back of $25.06 per unit was proper. This is $4.02 per unit in excess of the recalculation, *supra*.

(g) Since, as a matter of law, it is determined that spare parts and tools were included in the contract price as the Board concluded, then plaintiff is entitled to recover from defendant $4.02 per unit or (since 270 units were affected), the sum of $1,085.40 on claim (1).

(2)

Excess Weight

11. Contract DA 11-009-QM-19174, Standard Form 36, provided in part:

GUARANTEED SHIPPING WEIGHT: 1,900 lbs. each—Item 3
1,550 lbs. each—Item 2

Item 2 was the electric motor driven refrigeration unit. Item 3 was the gasoline engine driven refrigeration unit which was subsequently deleted by change order and was never produced under the contract.

12. (a) The contract documents required plaintiff to submit to defendant's contracting officer drawings covering the assembly of the entire refrigeration unit and provided that fabrication should not commence until the drawings had been approved.

(b) The contract documents also required plaintiff, before commencing production, to submit to defendant a preproduction sample for approval and that the sample must meet certain tests.

(c) The contract further provided:

3.4 Design and construction.—Design and construction shall conform in general with the attached drawings and as hereinafter specified.

* * * * * *

3.4.2 Construction.—

* * * The net weight, exclusive of refrigerant, gasoline, oil and water, shall not exceed 1500 Pounds.

13. (a) Plaintiff submitted three designs which were rejected by defendant. Thereafter, plaintiff's representative and defendant's representatives conferred "on several of the disputes then existing" at the office of the Quartermaster General. Plaintiff's representative subsequently testified before the Armed Services Board of Contract Appeals that in coming to an agreement with defendant's representatives regarding a design "insisted upon by the Government" plaintiff accepted a design which resulted in substantially heavier units than the units would have been under the designs which plaintiff had previously submitted.

(b) There is no evidence that the design which was approved by defendant's representatives was outside the contract specifications or that defendant's representatives acted in bad faith or in an arbitrary manner in rejecting the designs plaintiff submitted or in working out with plaintiff's representative an acceptable design; nor does the evidence establish that plaintiff could not have produced the units in compliance with the approved design without exceeding the guaranteed shipping weight.

14. (a) Defendant's inspection report dated April 2, 1953, of the rejection of the first pilot model contained the following language:

* * * Previous authorization was given to employ a steel frame if the weight limitation was not exceeded.

(b) The final pilot model was accepted by defendant without notation of excess weight.

15. (a) Refrigeration units produced under the contract exceeded the guaranteed shipping weight, and defendant deducted the sum of $484.23 from payments to plaintiff for actual transportation charges attributable to the excess weight.

(b) The body of a letter dated August 31, 1953, to defendant from plaintiff's representative reads:

You have deducted from our several invoices, covering shipments made under subject contracts, transportation charges for unit weights in excess of the weights estimated in our bid response to QM 11–009–52–1089.

We had estimated a shipping weight of 1550 lbs. each, and the actual weight is 1980 lbs. However, the estimate was predicated upon the Government's approval of our design concept of the equipment, and it will be recalled that considerable negotiation took place before an agreement in respect of design was effected. It may be that we should have qualified the agreement to take care of the consequent weight increase, but the subject was not mentioned and we neglected to do so. I feel confident that it was an oversight on the part of each of us; and trust that upon reconsideration you will find it possible to remit the sums withheld and to authorize payment of our future invoices without such withholdings.

(c) The body of a responding letter dated September 9, 1953, addressed to plaintiff from defendant's contracting officer reads:

Reference is made to your letter dated 31 August 1953 pertaining to Contracts No. DA 11–009–QM–19168 and 19174.

The Invitation for Bids specifically contained a clause entitled 'Guaranteed Shipping Weight'. The bidder was required to fill in the appropriate space indicating his guaranteed shipping weight for the item as described in the Invitation and contracts. In this instance, Keco Industries indicated that the Guaranteed Shipping Weight for a 10,000 BTU refrigeration unit, electric motor driven, was 1,550 lbs. Consequently, the Fiscal Office is deducting from your invoices excess transportation costs incurred because of this underestimation of Guaranteed Shipping Weight.

Your letter makes reference to the fact that there was 'considerable negotiation' before agreement in respect to design was effected. The facts of the case are that the Invitation clearly specified the type of unit to be furnished under subject contracts and the specification and drawings attached thereto clearly defined the type of unit and construction, as well as certain performance requirements. The dimensions of the unit as well as other structural details were furnished. The design was set forth in the Invitation for Bids and there has been no change in design since the Invitation was issued on these contracts and item. Hence, this office is without

authority to comply with your request to increase the Guaranteed Shipping Weight from 1550 lbs. to 1980 lbs. without adequate consideration on the part of the Government.

16. On March 19, 1954, the contracting officer issued and sent to plaintiff findings of fact and his decision with respect to various items, reading in part:

> In the Guaranteed Shipping Weight Provision of your bid, upon which contract No. DA 11-009 qm-19174 is based, your company guaranteed that the shipping weight of the Electric Unit would not exceed 1,500 lbs., and that the shipping weight of the Gasoline Unit would not exceed 1,900 lbs. On Invitation for Bids, calling for supplies F.O.B. Origin, these guaranteed shipping weights are required for the purpose of evaluating bids, i.e., determining the delivered cost of supplies to the Government. In your bid, you agreed that when such weights were exceeded, your company would reimburse the Government for all freight costs in excess of those which would have been incurred had the supplies not exceeded the guaranteed weight.

17. On March 30, 1956, following plaintiff's appeal from the decision of the contracting officer and after a hearing on the appeal regarding the various claims of plaintiff, the Armed Services Board of Contract Appeals rendered its opinion reading in part:

> The contracting officer determined in his findings that the 100 electric motor driven units produced in compliance with Change Order No. 2 were over the guaranteed weight limit, and that the appellant was therefore liable for excess shipping costs in the amount of $484.23. It was stipulated at the hearing that this was the correct amount if that determination should be sustained.
>
> Contract No. 19174 calls for delivery f.o.b. origin. It represents the weight of the electric motor driven units to be not over 1,550 pounds each, and undertakes to reimburse the Government for transportation costs due to underestimation of that maximum shipping weight. These units were well over that limit. The appellant denies liability for the excess on the ground that they were within the limit as originally designed, but that design changes required by the Government created the excess. The Government replies that the only changes in design required by it were those necessary to achieve conformity to the specifications. No claim is made that

such requirements called for anything beyond the specifications. The contract provisions were clear. No reservation or qualification as to design was attached to the representations of the maximum weight. The appellant is therefore bound by it and is liable for excess transportation costs in the stipulated amount. This portion of the appeal is accordingly denied.

* * * * *

(3)

Change Order No. 2

18. (a) The body of a letter dated June 18, 1953, addressed to plaintiff from defendant's contracting officer reads:

> In accordance with the Changes Article of subject contract, Item No. 3, refrigeration unit, gasoline engine driven, as described in the contract, is to be changed to refrigeration unit, electric motor driven, identical to Item No. 2 of the contract. Items No. 3a and 3b will no longer be required. Hence, in effect, Item No. 3 is being deleted and Item No. 2 is being increased by 100 units.
>
> Because of this increased quantity, there should be a reduction and savings in engineering costs and starting load costs. It is requested that you advise this office by return mail the lowest acceptable cost to you for building 100 additional electric motor driven refrigeration units. The price you offer should be substantiated by ample cost data.
>
> It is requested that this information be furnished this office promptly in order that the contract may be modified reflecting the above change.

(b) Sometime in June 1953 plaintiff stopped work on the gasoline motor unit pilot model. No gasoline driven units were ever produced by plaintiff. On June 30, 1953, plaintiff wrote a letter to the contracting officer, reading in part:

> We are agreeable to this change, and by reason thereof, will allow a credit of $28,600.00 against the contract price of Item No. 3, thereby changing the latter from $172,000 to $143,000.

(c) The body of a letter dated July 3, 1953, to defendant's contracting officer from plaintiff's representative reads:

> Referring to our letter of 30 June 1953, and confirming the results of my conference in Chicago on 1 July with Major Hensley and Messrs. Wildner and Lemke, we are agreeable to changing Item 3 of subject

contract and reducing the contract price of said item $32,850.00—from $172,000.00 to $139,150.00.

The latter figure is based upon a unit price of $1,391.50, in accordance with the calculations agreed upon at the aforementioned meeting. In support of our higher unit price ($1,434.00) I submitted and left with Major Hensley our original cost estimates for both the Gasoline Engine Driven and Electric Motor Driven units. I pointed out that in entering our bid to Invitation QM 11-009-52-1089, we had employed profit rates of 5% and 15% respectively on the Electric Motor and Gasoline Engine Driven units, and explained that the difference was predicated upon active competition in one case and little competition in the other. The average overall rate was approximately 10%.

I assume that appropriate Change Order will be issued shortly.

19. The body of a letter dated July 8, 1953, to plaintiff from the contracting officer reads:

> Please refer to your letter of 3 July 1953, in connection with your offer of a revised unit price of $1,391.50 covering the changeover from Gasoline Refrigerator Units to Electric Refrigerator Units on Contract DA 11-009-QM-19174.
>
> Our examination discloses that from a purchased parts, fabrication and assembly viewpoint, the gasoline unit is considerably more complex than the electric unit. The estimate of 81 hours or $220.00 direct labor per unit for both gasoline and electric units is not consistent with the direct material, fabrication and assembly analysis from the specifications requirements.
>
> In the absence of any direct labor cost estimate by a division of labor or piece work basis, this office will have to govern itself by the analysis results set forth in the preceding paragraph. In this connection it must be observed that the gasoline unit requires 48 additional purchased parts plus, that in lieu of a power unit, the gasoline unit requires a radiator, engine with fuel and oil lines, gasoline tank and four 6 volt batteries.
>
> Based upon the foregoing analysis, it appears that the direct labor costs on the gasoline units are greatly underestimated and, conversely, the profit highly overestimated. During our discussion on this matter the profit markup between the two types of units was the only controversial issue. Because of the direct labor situation on the gasoline unit it appears the profit markup is substantially less than the 15% on the submitted bid estimates.

In addition to the foregoing, your original award of 170 electric refrigerators will be increased by an additional 100 to 270, thereby, cutting down starting load costs by increasing volume. Likewise, the elimination of a different type of unit from the assembly lines should realize additional savings in production. Finally, in the event your offer of a unit price revision to $1,391.50 were accepted by this office, we would be placed in the peculiar position of attempting to justify an increase over the existing contract unit price by $120.50 per unit in the face of increasing contract quantities by approximately 60% from 170 to 270 units.

In view of the above, this office rejects your tendered revised unit price of $1,391.50. It appears that the original unit price of $1,271.00 per electric unit represents a fair and reasonable price to all concerned. Accordingly, you are hereby advised that this office is not amenable to a revised unit price in excess of your original bid of $1,271.00.

Your compliance with the conclusions of this office may be indicated by official correspondence stating that the original bid price of $1,271.00 per unit is acceptable and satisfactory in connection with the specification changeover from a gasoline refrigerator unit to an electric refrigerator unit, resulting in a unit price adjustment from $1,720.00 to $1,271.00.

The terms of the contract, however, give you the right if you prefer, to conduct further negotiations at this office.

20. (a) The body of Change Order No. 2, dated October 9, 1953, addressed to plaintiff from defendant's contracting officer reads:

1. Pursuant to the authority contained in General Provision 2 titled 'Changes' of Contract DA 11–009 QM–19174 entered into under date of 6 June 1952 between the United States of America and Keco Industries, Inc., the provisions of said contract as heretofore modified by Supplemental Agreement No. 1 are further amended as follows:

For Item 3, 100 each Refrigeration Units Gasoline Engine Driven shall be converted to Refrigeration Units Electric Motor Driven in accordance with Military Specification MIL–R–11676 (QMC), dated 4 January 1952.

2. By reason of these changes, the nomenclature of Item No. 3 is amended, as follows:

Refrigeration Unit (For Refrigerated Warehouses), vertically mounted, Electric Motor Driven, 220 Volts, 3 phase, 60 Cycles, AC, in accordance with Military Speci-

fication MIL-R-11676 (QMC), dated 4 January 1952 and exceptions as indicated in the Schedule. (Stock No. 66-R-292-550)

3. By reason of these changes, Items Nos. 3a and 3b are deleted.

4. By reason of these changes, the provisions prescribing the compensation to be paid under said contract including the Guaranteed Shipping Weight and the provisions relating to delivery shall be subject to an equitable adjustment and if the parties fail to agree with respect thereto, such failure shall be treated as a dispute within the meaning of General Provision 12 of the contract, titled 'Disputes'.

5. Except as hereby amended, all of the terms and conditions of the said contract shall remain unmodified and in full force and effect and shall also apply in carrying out the provisions of this Order.

(b) On the same date, October 9, 1953, plaintiff wrote to defendant:

> Receipt of Change Order No. 2 to subject contract is acknowledged. Initial shipments of Item 3, as changed, will be made this week.
>
> We have carefully reviewed our costs which are involved in the production of these units, and will accept a reduction in the unit price of Item 3 of $153.54. This reduces the contract unit price from $1,720.00 to $1,566.46. The guaranteed shipping weight of the unit is 1,980 lbs.
>
> Agreeable to the suggestion contained in your letter of 6 October 1953, we submit in support of the foregoing the following cost figures taken from our purchase and production records in respect of Item 2 of subject contract; to wit:

1. Material Costs	$912.00
2. Spc. Parts & Tools	56.32
3. Total Material Costs	968.32
4. Labor 100 hrs. @ $2.70	270.00
5. Total Mfg. Cost	1,238.32
6. Gen'l & Adm	185.75
7. Total Costs	1,424.07
8. Profit	142.40
9. Selling Price	1,566.47

> We trust you will be in a position with the information you already have to approve the price reduction and new unit price. Our records are of course available for your inspection.

(c) On October 26, 1953, plaintiff wrote a letter to defendant in which plaintiff requested that the figures submitted in its letter of October 19, 1953, be increased to reflect a selling price per unit of $1,638.60.

(d) The body of a letter dated December 17, 1953, to defendant from plaintiff reads:

> Under date of 26 October 1953 we wrote you in regards to price adjustment under Change Order No. 2 of subject Contract. Meantime our production of said contract has been completed and we have been able to accurately and fully review our costs.
>
> I regret that the costs submitted in our said letter of 26 October and our earlier letter of 19 October were in error and that the final unit price of Item No. 3 of subject contract should be $1919.51.
>
> Our costs are under current review by your Cost and Price Analysis Section and I assume that you will shortly be in a position to discuss the matter at length with us. We are most anxious to bring the matter to a satisfactory conclusion.

21. (a) Change Order No. 2 substituted electric driven units produced in accordance with MIL-R-11676 (QMC) for gasoline driven units produced in accordance with MIL-R-11853 (QMC).

(b) MIL-R-11676 (QMC), as amended by Amendment No. 4, dated 9 April 1952, to IFB QM 11-009-52-1089 provides in part:

> 3.4.5 Power Unit Assembly—Power unit assembly shall consist of formed metal bed plate or tray with the fan motor and hermetic or semi-hermetic ype compressor mounted thereon. It shall be possible to remove the entire assembly and replace it with another assembly either gasoline-engine or electric-motor driven. * * *

(c) MIL-R-11853 (QMC) provides in part:

> 3.3.5. Power unit assembly—Power unit assembly shall consist of formed metal bed plate or tray with gas engine and direct drive compressor mounted thereon. It shall be possible to remove the entire assembly and replace it with another assembly, either gasoline-engine driven or electric-motor driven. * * *

(d) The evidence establishes that the only essential difference between the electric refrigerators and the gasoline refrigerators in question is the power unit. The overall dimensions of the two types of refrigerators are the same and most basic parts are the same.

(e) Plaintiff purchased the power units and compressor units fully assembled. Plaintiff's main productive capacity was allocated to the assembly of electric motor refrigeration units and plaintiff was producing such units under its contracts with defendant when Change Order No. 2 was issued.

22. On March 19, 1954, the contracting officer issued and sent to plaintiff findings of fact and his decision with respect to various items, reading in part:

> The Electric Refrigerating Units are identical to the Gasoline Refrigerating Units except that one has an electric motor and the other has a gasoline engine. Examination of your books and records discloses that in estimating your costs for bid purposes, you underestimated your material and labor costs with respect to both the Electric and Gasoline Units. This presents a problem in arriving at an equitable adjustment under the Changes Article since such article does not authorize the correction of the mistake in bid which you made on the Gasoline Unit. On the other hand, it is recognized that the Changes Article does not require the perpetuation of the mistake in bid which you made with respect to the Electric Unit. For this reason, your bid estimates on the Gasoline and the Electric Units were examined for the purpose of determining the difference in cost between such units. It was established that the material and labor costs on the Gasoline Unit were $265.22 more than such costs on the Electric Unit. The amounts which you included in your bid on the Gasoline Unit for profit and G&A expense were deducted from your bid price of $1,720.00, which leaves $1,301.00 as the manufacturing costs included in your Gasoline Unit bid. From this was subtracted the amount of $265.22, leaving the manufacturing costs of the Electric Unit as $1,035.78. To this was added the 15% G&A expense and the 15% profit which you had included in your bid on the Gasoline Unit. The revised unit price on the 100 Gasoline Units converted to Electric Units is therefore established as $1,369.82. Report of the Cost & Price Analysis Branch, dated 4 January 1954, setting forth the cost data and basis for computing such revised price is herewith adopted by the undersigned and made a part of these Findings of Fact by reference.
>
> On 15 January 1954, Mr. Robert G. Adair of your company visited this Office and discussed the Cost & Price Analysis Report with various personnel of this Office, including the Successor Contracting Officer Captain Donald G. Rice. It was the position of Mr. Adair

that the equitable adjustment should be based on the actual cost of producing the Electric Units and that as such actual cost exceeded $1,720.00 per unit, the amount bid on the Gasoline Unit, there should be no reduction in the price. Mr. Adair was advised that if actual costs were to be used, the actual cost of the Electric Unit would have to be compared with the actual cost of the Gasoline Unit, the amount of the equitable adjustment being the difference between such costs. He was further advised that the equitable adjustment could not be based on the actual costs, as there was no actual cost data available with respect to the Gasoline Units. He was advised that if your company did have any actual cost data with respect to the Gasoline Units, such data should be forwarded to this Office. No actual cost data has been furnished to this Office with respect to the Gasoline Units, and it is assumed that such actual cost data is not available since no Gasoline Units were produced by your company. Accordingly, it is the finding of the undersigned that, in the absence of data on the actual cost of the Gasoline Units, the equitable adjustment must be based on a comparison of the bid estimates on the Gasoline and the Electric Units. The undersigned finds that the price of Item 3 should be reduced by $350.18 per unit, or a total contract price reduction of $35,018.00 due to the change of the 100 Gasoline Units to Electric Motor Driven Units.

23. On March 30, 1956, following plaintiff's appeal from the decision of the contracting officer and after a hearing on the appeal regarding the various claims of plaintiff, the Armed Services Board of Contract Appeals rendered its opinion reading in part:

> The Changes article authorizes the contracting officer to make changes
>
> > 'within the general scope of the contract, in any one or more of the following: (1) drawings, designs or specifications, where the supplies to be furnished are to be specifically manufactured for the Government in accordance therewith;'
>
> and provides that an equitable adjustment in price be made in the event such a change causes an increase or decrease in the cost of performance. It must be determined therefore, whether the substitution of 100 electric motor driven units for gasoline driven units was merely a change in design or specifications or whether it was a procurement of a new and different article.

The gasoline engine driven units were required to be manufactured in accordance with Military Specification MIL–R–11853 (QMC) while the substituted electric motor driven units were to be made in accordance with Military Specification MIL–R–11676 (QMC). Although it is not disputed that the units were intended to perform identical functions, the two specifications contain no reference to each other. Paragraph 3.4.5 of the latter specification as revised by Amendment 4 to the invitation, however provides that it shall be possible to remove the entire power unit assembly and replace it with another assembly either gasoline engine or electric motor driven and the former specification has a similar provision in paragraph 3.3.5.

Appellant contends that the units were not interchangeable, since the gasoline engine driven unit had an open style compressor as opposed to a semi-hermetic compressor, batteries, gasoline tank and a different system of controls. It is admitted however that the over-all dimensional size of both refrigerating units was substantially the same and that both specifications provided only for maximum and minimum measurements. We are of the opinion that Change Order No. 2 was not the procurement of a new and different article but was a change within the general scope of the contract and was encompassed within the purview of the Changes article.

The Changes article with its provision for an equitable adjustment in price is therefore applicable. The Government and appellant have, however, failed to agree. The Government reduced the contract price by way of equitable adjustment in the sum of $350.18 per unit for each of the 100 disputed items, for a total of $35,018. The appellant maintains the price should be increased from $1,710, which was the contract price for the gasoline unit, to $1,919.51 per unit as the result of the issuance of Change Order 2. Equitable adjustment for the 100 disputed items is therefore the subject of this portion of the appeal.

In June 1953, work on the gasoline units was discontinued in anticipation of the formal issuance of Change Order No. 2 on 9 October 1953 (supra). Thereafter, 100 additional electric motor driven units instead of the gasoline units were delivered and accepted by the Government, the price to be paid therefor to be later determined. In the meantime negotiations between the parties proceeded by letter and personal conference in an effort to reach an agreement as to price. Various proposals were offered by each party, but no price for the items could be agreed upon. The actual costs of pro-

duction were not finally determined until after completion of the work.

Beginning on 14 December 1953 following delivery and acceptance of all contract items, an audit was made of the appellant's costs by the Cost and Price Analysis Section of the Chicago Quartermaster Depot. It was found therein that appellant's figures were accurate, and they were accepted by the contracting officer as the basis for his computation of the price adjustment made.

It is undisputed that the original bids and contract prices of $1,271 for the electric motor driven units and $1,720 for the gasoline engine powered units were much too low, and that performance at those prices would result in substantial loss to appellant.

The Government auditor's report disclosed the difference between appellant's original bid estimates and the corrected bid estimates for the electric and gasoline units. It is quoted in summary as follows:

Particulars		Material Costs	Labor Including Factory Burden	G & A Expense	Total Costs
Electric Unit					
Original Bid Estimates		$832.00	$220.00	$158.00	$1,210.00
Add: Unilateral Mistakes in Bid					
1. Material and Purchased Parts					
Schedule 4a	$491.29				
Schedule 4b	407.80				
Schedule 4c	73.49				
Schedule 4d	166.85				67.09
Total	1,139.43				73.49
Less: Bid Est	$832.00	307.43			166.85
2.2. Direct Labor & Factory Burden					
Exhibit V & VI	370.10				
Less: Bid Est	220.00		150.10		150.10
3. G & A Expense					
Exhibit VI	94.05				
Less: Bid Est	158.00			(63.95)	(63.95)
Corrected Bid Estimates		$1,139.43	$370.10	$94.05	$1,603.58
Gasoline Unit					
Original Bid Estimates		$1,081.00	$220.00	$195.00	$1,496.00
Add: Unilateral Mistakes in Bid					
1. Material & Purchased Parts					
Schedule 4a	$491.29				
Schedule 4b	407.80				
Schedule 4c	73.49				
Schedule 4d	166.85				
Total	$1,139.43				
Add:					
Exhibit III	265.22				83.31
	$1,404.65				73.49
Less:					
Bid Est	1,081.00	323.65			166.85
2. Direct Labor & Factory Burden					
Exhibits V & VI	$370.10				
Less: Bid Est	220.00		150.10		150.10
3. G & A Expense					
Exhibit VI	$94.05				
Less: Bid Est	195.00			(100.95)	(100.95)
Corrected Bid Estimates		$1,404.65	$370.10	$94.05	$1,868.80

The foregoing disclosed that the actual cost of production of the electric unit and gasoline unit was $1,603.58 and $1,868.80, as compared with bid prices of $1,271 and $1,720 respectively.

The revised unit price on the 100 gasoline units changed through operation of the Changes article to electric units was computed by the Government auditors and adopted by the contracting officer as $1,369.82 per unit, which was computed in the following manner.

Particulars	Amount Detail	Amount Total
Bid Price of Gasoline Unit		$1,720.00
Deduct: Profit	$224.00	
G & A Expense	195.00	419.00
Manufacturing Costs of Gasoline Unit Per Bid Estimate		$1,301.00
Deduct: Difference in material costs between a Gasoline and Electric Unit per Exhibit III		265.22
Manufacturing Costs per bid estimate of Electric Unit per change article		$1,035.78
Add: 15% G & A Expense in common with bid estimate preparation		155.37
Total Costs in common with bid estimate preparation		$1,191.15
Add: 15% per bid estimate structure—profit		178.67
Revised unit price on the 100 gasoline units changed thru operation of the changes article to Electric Units		$1,369.82

'NOTE

The contractor contends that with respect to direct labor costs the fabrication and assembly of both units were considered as one overall pool without segregation as to gasoline and electric units. Although this office is of the opinion that direct labor costs are much larger on the gasoline units (Note additional material costs, heavier weight and cost estimates of competitors) nevertheless in the subject matter we are unable to prove such opinion and experience of competitors. Accordingly, rather than enter into a verbal controversy without hope of resolution, Cost & Price Analysis has accepted the contractor's contention and allegations and made no adjustments for a direct labor differential.'

The revised unit price of $1,369.82 deducted from appellant's bid price of $1,720 for the gasoline unit is a difference of $350.18 for each unit, which the Govern-

ment contends should be deducted by way of equitable adjustment from the contract price for a total amount of $35,018.

Appellant by adapting the Government auditor's corrected material costs of $1,139.43 as distinguished from its original bid estimate of $832, claims that it should be paid $1,919.51 per unit for the 100 disputed items which amount was computed as follows:

Material		1,139.43
Labor	263.23	
Factory Burden	141.74	377.97
Manufacturing Cost		1,517.40
General & Administrative		227.61
Total Cost		1,745.01
Profit		174.50
Selling Price		1,919.51

The question presented to the contracting officer and now presented to the Board is what constitutes an equitable adjustment as the result of the issuance of Change Order No. 2 under the circumstances in this case.

The contracting officer's adjustment in price is predicated on the theory that the Changes article cannot be used to correct an improvident bid. It was determined by the Government's cost analysis that the actual cost of production of the electric unit was $1,603.58 as compared with appellant's bid price of $1,271. The cost of production of the gasoline unit was determined to be $1,868.80 as compared to a bid price of $1,720. It was therefore concluded that the appellant had entered an improvident bid on both items, and to use the actual costs incurred on the electric unit as a measure of the price that should be paid due to the change order would result in paying the appellant an amount which it would not have recovered if it produced the gasoline unit. Since the degree of improvidence between the electric unit and the gasoline unit was not identical, the price to be paid for the electric unit was increased from the bid price of $1,271 to $1,369.82, in order to make up the difference between the improvidence in the bid on the electric unit and the improvidence in the bid on the gasoline unit, thereby not perpetuating the mistake in bid which was made in respect to the electric unit.

The Government's adjustment in this case, however, is considered inequitable, since, if appellant had been permitted to manufacture the gasoline unit its loss would have been the difference between the bid price

of $1,720 and the cost thereof, computed to be $1,868.80, or a loss of $148.80 per unit. The effect of the change order was to cause appellant not to produce 100 gasoline units on which it would have lost only $148.80 per unit, or a total of $14,880, and to produce 100 electric units on which the contract price is reduced $350.18 per unit for a total reduction of $35,018, which amount represents the difference between the bid price of $1,720.00 for the gasoline unit and $1,369.80 awarded the appellant by way of equitable adjustment.

In our opinion appellant should not be left in a worse position as the result of the issuance of the change order, which caused it to produce units on which its loss due to an improvident bid on the electric unit was more than twice of its loss due to its improvident bid on the gasoline unit, particularly when these facts were known to the Government. The difference between the bid price on the electric unit, that is $1,271, and the cost of producing the same, $1,603.58, is $332.58; whereas this difference in the gasoline unit was only $148.80 ($1,868.80 less $1,720).

We hold under the circumstances in this case that it would be inequitable to reduce the contract price of $1,720 per unit for the 100 units produced by appellant as the result of the issuance of Change Order No. 2 in the amount of $350.18 per unit ($1,720 less $1,369.82), or for a total of $35,018. In our opinion appellant is entitled by way of equitable adjustment to the cost of producing the disputed 100 units which has been determined to be $1,603.58 per unit, plus a reasonable profit, which we have determined to be 10 percent. We hold therefore that appellant is entitled by way of equitable adjustment to be paid the sum of $1,763.94 for each of the 100 electric units produced by it as the result of the issuance of Change Order No. 2, or a total of $176,394.00 and not $136,982.00 ($1,369.82×100) as determined by the contracting officer.

This portion of the appeal is sustained to the extent indicated above.

24. Although plaintiff takes issue with certain of the items contained in the Government audit, referred to in the Board's opinion, regarding unit costs, it is found that the audit unit cost of $1,603.58 on electric driven refrigerators and $1,868.80 on gasoline driven refrigerators are amply sustained by the record.

CONCLUSIONS OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that on claim (1) plaintiff is due $1,085.40; that plaintiff's claims (2) and (3) are denied; and that defendant is entitled to recover on its counterclaim the amount of $30,916, making a net recovery to defendant in the amount of twenty-nine thousand eight hundred thirty dollars and sixty cents ($29,830.60), and judgment is entered for defendant in that amount.